INDEX TO APPENDIX

PAGE

Relevant Docket Entries..... 1– 3

Order Granting Petition for Certiorari..... 4

Opinion of the Court of Appeals of Kentucky..... 5–21

Order of the Court of Appeals Overruling Petition for Rehearing 22–23

Corrected Judgment and Certificate of Contemptuous Action in the Presence of the Trial Court.....23–27

Proceedings Upon Imposition of Punishment for Contempt 28–29

Excerpts from Transcript of Proceedings in Commonwealth v. Tinsley.....30–120

RELEVANT DOCKET ENTRIES

1/ 2/72 Petitioner-Appellant filed motion and notice for ex. of time to & incl. March 30, 1972, to file the Record on Appeal.

1/18/72 Court Order Delivered Granting Period to & Incl. Jan. 31, 1972 for Purpose of Submitting the Necessary Supporting Documents to Accompany Such Motion as Required.

1/31/72 Appellant filed Certified Copies of Order of Contempt, Notice of Appeal (11-3-71), Order prohibiting practice of Law, Notice of Appeal (11-4-71) Notice of Appeal (11-12-71) & Motion for Extension of Time (12-8-71), accompanied by Affidavit of Virginia Klapheke, official court reporter.

2/ 1/72 Court Order Delivered Sustaining Motion for Ext. Time to & Incl. March 30, 1972 to File Record on Appeal.

2/ 9/72 Respondent-Appellee filed not. & mot. for leave to correct the judgment under RCr 10.10. See Court Order 2-21-72.

2/17/72 Appellant filed response & notice to motion to correct judgment.

2/21/72 Appellee filed reply & notice to appellant's response to mot. to correct judgment.

2/21/72 Court Order Delivered Sustaining Motion to Correct Judgment & Ordering Correction Made Within 20 days Fro mThis Date.

2/25/72 Appellant filed Not. & Motion to Substitute Robert A. Sedler as counsel of record for appellant and to strike Stuart Lyon as his counsel. See Court Order 3-9-72.

3/ 1/72 Appellee-Respondent filed notice & Corrected Judgment and Certificate of Contemptuous Action in the Presence of the Trial Court,

3/ 9/72	Court Order Delivered Substituting Robert A. Sedler as Attorney for Petitioner & Deleting Name of Stuart Lyon as Attorney.
3/30/72	Appellant filed affid., not. & mot. for addit. time to & incl. April 6, 1972 to file record on appeal. Sustained SS ht 4-13-72.
4/13/72	Appellant filed Statement of Appeal, $25.00 filing fee, and 1 vol. of Transcript of Record, and notice and motion of appeal. Sustained & Final Ext. to & Incl. 6-13-72 Grantd SS ht 5-30-72.
5/16/72	Appellant filed not. & mot. for ext. time up to & incl. June 13, 1972 to file brief.
6/13/72	Appellant filed briefs & notice.
6/26/72	Appellant filed not. & mot. to subst. corrected brief (attached). (Agreed to July 18, 1972) (Sustained SS ht 7-18-72).
7/18/72	Appellant filed corrected briefs & notice.
7/21/72	Appellee filed not, & mot. for ex. of time to file brief to & incl. Aug. 25, 1972 with affidavit in support of. Sustained SS ht 8-3-72.
8/10/72	Appellee filed not. & mo. to dismiss.
8/10/72	Appellee filed briefs and notice.
8/11/72	Submitted.
8/21/72	Court Order delivered passing mot. to dismiss to the merits.
8/29/72	Appellant filed Reply Briefs & Notice.
9/14/72	Appellant filed Not. & Mot. for Oral Argument.
3/14/73	Affirmed in Part and Reversed in Part (Comm. Catinna)
4/19/73	Appellant filed Petition for Rehearing & Notice.
4/26/73	Appellee filed Response & Notice to Appellant's Petition for Rehearing.

5/ 3/73 Appellant filed not. and motion for stay of enforcement of Mandate pending review by U. S. Supreme Court (See Court Order 5/22/73).

5/22/73 Court order del'd passing for further consideration Appellant's mot. to stay execution of the mandate in connection with the Court's determination of the merits of the Pet. for Rehearing.

6/15/73 Court Order del'd granting Appellant mot. for stay of execution & enforcement of the mandate to & incl. 9/14/73—pending Appellant's Application for Writ of Certiorari, etc. (See Court Order 9/17/73).

6/15/73 Petition for Rehearing Overruled.

9/13/73 Appellant filed Not. & Motion for extension of Ct. Order of June 15, 1973 Stay Mandate, until such times as U. S. Supreme Court has considered & Disposed of the Pet. for Writ of Certiorari.

9/17/73 Court Order del'd denying Appellant's Motion for an ext. of Court's previous order staying for 90 days the execution of its mandate.

6/15/73 Mandate Issued.

ORDER GRANTING PETITION FOR CERTIORARI
December 3, 1973

No. 73-473 Taylor v. Hayes

The petition for a writ of certiorari is granted limited to Questions 1, 2 and 3 presented by the petition which read as follows:

"1. When a trial judge summarily imposes consecutive sentences on eight counts of contempt aggregating four and one-half years' imprisonment, including sentences of one year's imprisonment on two counts, whether he or the appellate court may subsequently, in order to defeat the alleged contemnor's right to trial by jury, reduce the sentences so that the sentence on no one count exceeds six months' imprisonment and direct that the sentences run concurrently for a total of six months' imprisonment?

"2. When alleged contempts have been committed by an attorney in the presence of the trial judge and the trial judge proceeds summarily to punish for contempt, whether due process requires that the attorney be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed?

"3. Whether, in the circumstances of this case, the trial judge could impartially sit in judgment on multiple contmpt charges against the petitioner?"

OPINION OF THE COURT OF APPEALS OF KENTUCKY
March 23, 1973
494 S. W. 2d 739

CATINNA, Commissioner.

Daniel T. Taylor, III, appeals from a judgment and order of the Jefferson Circuit Court, Criminal Branch, Second Division, finding him guilty upon eight charges of contempt and committing him to the City of Louisville Jail for a total of three years and five months. He further appeals from an order of the same court prohibiting him from the further practice of law in that particular court because he had been theretofore found guilty of contempt of court.

The charges of contempt against Taylor result from his conduct in the defense of Narvel Tinsley. Narvel Tinsley and his brother, Michael Tinsley, were jointly indicted and charged with the murder of two police officers. The Tinsleys were black men while the police officers were white. The murders created some considerable sensation in Louisville, and feelings in the different communities were very pronounced. The news media tended to publicize each and every phase of the events surrounding the murders, and there was some apparent cooperation on the part of the authorities, as there is mention made of live television coverage of the site where the murders were said to have been committed. A news conference, with television coverage, announced the arrest of the Tinsleys. Later Narvel Tinsley escaped jail, and again newspaper coverage was overly abundant. It was in this situation that the joint trial of Narvel and Michael Tinsley was finally commenced on October 18, 1971.

Daniel Taylor, III, represented Narvel Tinsley while Michael Tinsley was represented by Attorneys Fleming, McCall, and Scott.

The trial lasted from October 18 through October 29, 1971, with Sunday excepted, and it was in the course of this trial that Taylor committed the offenses which were considered contemptuous in nature by the court. The particular acts of contempt as specified by the court in a "Corrected Judgment and Certificate of Contemptuous Action in the Presence of the Trial Court" were as follows:

"Contempt 1. Mr. Taylor, in questioning a prospective juror, on the second day of Voir Dire, repeatedly ignored the Court's order not to continue a certian line of questioning and to ask his questions to the jury as a whole. He evidenced utter disrespect for prospective jurors.

"Contempt 2. The Court sustained the Commonwealth objection on the use of a prior statement to cross examine Officer Hogan and not to go into the escape of Narvel Tinsley. Mr. Taylor repeatedly and completely ignored the Court's ruling.

"Contempt 3. During the playing of a tape recording of a voice of witness David White, Mr. Taylor wrote on a blackboard. After the playing of the tape it was ordered that the blackboard be removed from the Court and Mr. Taylor was advised by the Court that he could use it in his final summation to the jury. Mr. Taylor was disrespectful to the Court by his tone of voice and manner when he replied, "I'll certainly keep that in mind, your Honor.'

"Contempt 4. During cross-examination of Narvel Tinsley, by Mr. Schroering, Mr. Taylor interrupted and moved for a recess, was overruled by the Court, and then became most disrespectful to the Court and refused to take his seat at counsel's table as ordered.

"Contempt 5. Complete and utter disrespect by Mr. Taylor in the questioning of Mr. Irvin Foley, an

attorney and Legal Advisor to the Louisville Police Department when he continually disobeyed the Court's ruling regarding a press conference which the Court had ruled on unadmissible (sic). Mr. Taylor accused the Court of disallowing admittance of black persons in the Courtroom during the examination of this witness and made a statement in the presence of the jury inferring that only white police officers could enter the courtroom. It has always been the Rule of the Court that there will be no interruption during the examination of a witness or during closing arguments by people coming and going into and from the Courtroom, which rule was known to Mr. Taylor.

"Contempt 6. The witness Jesse Taylor, a Louisville Police Officer, read a statement by witness, David White. A Ruling was made by the Court that the statement spoke for itself, had been introduced in evidence and could not be commented on by Officer Taylor, who merely took the statement. Mr. Taylor continued to disregard the Court's order and ruling by continually reading parts of the statement out of context.

"Contempt 7. Mr. Taylor in examining Mr. Norbert Brown, again referred to a press conference that the Court had previously ordered him not to go into. He also waved his arms at the witness in a derogatory manner indicating the witness was not truthful and showing utter contempt of the Court's ruling.

"Contempt 8. The Court directed Mr. Taylor to call his next witness. He called Lt. Garrett, Louisville Police Department. After this witness was sworn and took the stand, a deputy sheriff advised the Court that Mr. Taylor's aide was not searched, as everyone else had been upon entering the Courtroom. Mr. Taylor ordered the deputy to search his aide. The Court or-

dered Mr. Taylor to begin his examination, which he refused to do until he was cited for contempt in the Court's chamber.

"Contempt 9. Mr. Taylor repeatedly asked the same question of witness Floyd Miller that the Court had held improper. He was also disrespectful in his tone of voice when referring to a certain police officer as 'this nice police officer.'"

We have examined the entire record of the Tinsley trial, and it becomes immediately apparent that even before the trial had "gotten off the ground, so to speak," Taylor had embarked upon a plan or program designed to disrupt the trial and by any means possible cause the trial court to commit trial errors which might form the basis of an appeal. His actions were such as to clearly illustrate that they were deliberate, delaying, or planned disruptive tactics which did in fact create such an atmosphere in the court that he, if permitted to continue, would have appeared to be the star performer in the center ring of a three-ring circus. He constantly harrassed the court by innumerable objections, statements, and requests for conferences in chambers, and, in truth, the record indicates that a great percentage of the trial time was consumed by the court and counsel attending speeches made by Taylor in the court's chambers.

As the trial progressed, there was a constant refusal on the part of Taylor to desist in his arguments, some in the presence of the jury and some at the bench. He refused upon occasions to maintain his seat so that the orderly processes of the court were available to the defendants. He continuously disregarded the court's orders and directions concerning the examination of jurors or witnesses and persisted in repetitious questioning and argument with both jurors and witnesses. Taylor launched a long tirade seeking to have the court remove opaque screens that had been

placed over the windows and doors so as to lend some degree of privacy to the proceedings and protect the participants in the trial from the disconcerting demonstrations which we being conducted in and around the building. Taylor claimed that by the screening of the windows and doors his client was not receiving a public trial. Later, he made a monumental production of the fact that the court was refusing to admit spectators in crowds, claiming that by reason of this policy his client was not receiving a public trial. Again, the clearing of the back two rows of benches in the courtrooom following laughter, noise, and other disruptive practices by the spectators was claimed by Taylor to be prejudicial to his client's receiving a fair trial.

There is no necessity of detailing the innumerable acts of Taylor which clearly reflected his contempt for the court as well as the judicial system of this Commonwealth. His actions were such as to place on trial the entire judicial system of the Commonwealth and those judges sworn to uphold its Constitution and laws and thereby assure defendants, a fair, orderly, and speedy trial.

Taylor was overbearing, contemptuous, and obnoxiously persistent in his questions and objections, and his misconduct was such that those attorneys representing Michael Tinsley, claiming that his antics prejudiced the rights of their client, were continually objecting to his tactics and moving the court that a severance be granted. The incidents necessitating objections on the part of Michael Tinsley's attorneys were so persistent and so constant that rather than consume the time of the court in a constant repetition of the rather involved objection and motion, the parties got to the place of calling it "Objection No. 1." We find all through the record this Objection No. 1 made on behalf of Michael Tinsley.

In the light of the entire record this court can only conclude that Daniel Taylor was guilty of each and every con-

tempt as charged by the court, and if the court had so desired there could have been numerous other charges assessed in the course of the trial. In spite of Taylor's contemptuous conduct throughout the trial, we do not find at any point in the record an occasion where Taylor made any personal attack upon the judge, his integrity, or ability. On the contrary, Taylor was polite to the point of almost being condescending. At no time was his conduct of such a nature as to create a personal controversy between him and the court.

Throughout his brief, Taylor complains continuously of the conduct of the judge. He is identified as "an activist seeking combat" and charged with an actual intent on his part to purposely "bait" Taylor beyond the endurance of any lawyer to accept such vilification and abuse. The judge is charged with exercising an "uncontrollable animus" toward Taylor during the entire proceedings and with fighting him on a personal basis because he was attorney for Narvel Tinsley. Taylor's brief says that such charges are grave, and this court agrees with him to the extent of saying that the brief in itself demonstrates something less than complete and total respect for the judicial system of this Commonwealth. Our examination of the record fails to substantiate in the least any of the charges of misconduct on the part of the court that were discussed and complained about in Taylor's brief. In fact, we reach a contrary conclusion, for it seems to us that the court "leaned over backwards" in an effort to assure Narvel Tinsley a fair trial in spite of the misconduct of his attorney.

The contempt citations and the sentences coming at the end of the trial were not and could not have been a surprise to Taylor, because upon each occasion and immediately following the charged act of contempt the court informed Taylor that he was at that time in contempt of court. All of these acts were committed in open court and made known to Taylor at the time of their commission and, therefore, he

cannot now complain that he was unaware of the nature of the charged contempt. Cf. Cooke v. United States, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925). The conduct of the judge throughout the trial was motivated by his efforts to maintain order in his courtroom and to see that the trial was properly conducted. The court was never the "activist seeking combat," but rather he appeared to be continuously on the defensive in his effort to contain Taylor to the point where the defendants would be assured a fair trial.

Upon completion of the trial, the case was submitted to the jury which returned verdicts finding each of the Tinsleys guilty and fixing their punishment at death. After the verdicts had been returned, but before the jury was discharged and while it was seated in the jury box, the following proceeding took place:

"The Court: Mr. Taylor, the Court has something to take up with you, sir, at this time.

Mr. Taylor: Well, I'll be right here, Judge.

The Court: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years on this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean that it's based upon planned confusion.

Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule—

Mr. Taylor: (Interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself."

The court thereupon sentenced Taylor on nine counts of contempt aggregating in all four and one-half years. However, this court permitted the trial judge to file a corrected judgment by which Taylor was sentenced upon eight charges of contempt for a total of three years and five months in jail.

The right of the courts of this Commonwealth to maintain order by punishment for contempt has been a part of our law for a great number of years. In 1882 the right to punish for contempt without the intervention of a jury was recognized as fully established by the rules of the common law and therefore a part of the law of this state. Arnold v. Commonwealth, 80 Ky. 300.

A short time later contempt was defined in these words:

> "Civil contempts are those quasi contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court; while criminal contempts are all acts in disrespect of the court or its process, which obstruct the administration of justice, or tend to bring the court into disrepute." Wages v. Commonwealth, 13 K.L.R. 925 (1892).

An even more recent definition of contempt and one which fits Taylor like a glove is found in United States v. Seale, 7th Cir., 461 F. 2d 345 (1972), at page 371, where the court said:

> "On the positive side of the obstruction question, failure to heed the directive of the court to desist from arguing, to sit down, or to remain quiet may indeed constitute an actual material obstruction to the administration of justice. The unmistakable implication of In re McConnell, 370 U. S. 230, 235, 236, 82 S. Ct. 1288, 8 L. Ed. 2d 434, is that defiance of the court's order to cease questioning would have actually obstructed the proceedings. As governor of the trial, the trial judge must have the authority necessary to ensure the orderly and expeditious progress of the proceedings. His directives in exercise of this authority must be obeyed; otherwise the clear result would be courtroom chaos. Wholly arbitrary limits on argument will, if prejudicial, merit reversal of the substantive case, but that hardly can excuse open defiance of the court's commands. * * * We do not say that automaton-like reflexive obedience to the court's order is necessary to avoid a contempt citation. The law does not expect unhuman (sic) responsiveness. A certain amount of leeway must be allowed. But where the directive is clear, the judge's insistence on obedience is not undercut by his further rejoinder, and the party directed understands what is being asked of him, he must obey. * * *."

Taylor was so conclusively guilty of contempt, committed in open court in the presence of the judge, that under the present laws of this Commonwealth, we would have no difficulty in affirming the judgment of the trial court.

However, Taylor's claim that his rights under the 6th and 14th Amendments to the Constitution of the United

States have been violated requires that we re-examine the action of the trial judge upon these points. Taylor claims that the trial judge was so personally involved in controversy with him that he could not impartially sit in judgment on the contempt charge. The Supreme Court has held that a trial judge is disqualified to act on a contempt charge in situations where he has become personally embroiled in the controversy as an "activist seeking combat" or by reason of personal attacks upon the judge which in themselves carry a potential for bias.

In Offutt v. United States, 348 U. S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954), a fourteen-day trial was marked by an intermittent continuous wrangle between the trial judge and counsel for one Peckham. The court and Offutt were continuously arguing concerning the admissibility of evidence and the conduct and demeanor of each. The examination of witnesses was characterized by accusations and cross-accusations of the raising of voices, shoutings at one another, the waving of arms, and the making of unseemly gestures, all of which indicated that the court had become embroiled in the trial to the extent of carrying on a running fight with counsel for the defendant. It was really difficult to segregate the individual involvement of counsel and the court.

At the end of the trial the court declared Offutt guilty of contempt in open court and ordered him committed to the jail for a period of ten days. The United States Court of Appeals reduced the term to be served while the Supreme Court reversed the entire conviction. Such was reversed upon the ground that the trial court had become so deeply involved personally in the trial that his personal animosity toward Offutt was such that he could not impartially judge either the contempt or punishment of Offutt.

This case has been cited time and again for the theory that where a judge becomes personally involved, or

is "an activist seeking combat," he is thereby disqualified to act further. We do not find that here the trial court was an "activist seeking combat" with Taylor or otherwise. There is no evidence of personal embroilment or any type of controversy with Taylor. However, Offutt causes some considerable concern because in that case the court, in discharging the jury after the trial, made statements to them concerning Offutt's conduct and disrespectful performance and intimated that he should not be a member of the legal profession. The Supreme Court, in discussing the court's demonstrated bias and lack of impartiality, stated that these remarks made to the jury revealed his feelings toward the lawyer on whom he had to pass sentence.

The statements made in Offutt are somewhat similar to the statements made by Hayes in the presence of the jury and immediately prior to his sentencing Taylor. However, we do not take these statements as clearly demonstrating bias. The court had cited Taylor upon the contempt charges immediately upon his commission of the acts and at no time during the trial had the court made known to the jury that he had cited Taylor for contempt, much less the reasons for such citations. Here the remarks made by the court touching upon Taylor's conduct were more akin to a declaration of a charge against Taylor based upon the judge's observations and not a constitutionally disqualifying prejudgment of guilt.

The other disqualifying situation involves those events where the trial court is the object of a personal attack which in itself is of such a nature as to carry a potential for bias and thereby disqualify the judge from acting upon the contempt proceeding.

In Mayberry v. Pennsylvania, 400 U. S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971), the Supreme Court reversed a state criminal contempt sentence of eleven to twenty-two years on the ground that the due process clause of the 14th Amendment required a public trial before another judge,

viz.—that the trial judge was disqualified because of personal attacks upon him. We do not feel that this case has any application here for upon that trial the trial court was characterized as a "dirty sonofabitch," a "dirty, tyrannical old dog," a "stumbling dog," and told to "shut up" and "go to hell." The rule of Mayberry has been followed consistently, and probably its two most recent and famous proponents are the opinions in United States v. Seale, U. S. Court of Appeals, 7th District, 461 F. 2d 345 (1972), and In re Dellinger, U. S. Court of Appeals, 7th Circuit, 461 F. 2d 389 (1972). Of course, none of these latter cases has any application to the situation presently before this court, as it is crystal clear from the record that at not time did Daniel Taylor ever indulge in any personal attack of any kind upon the judge.

We might add one other distinguishing feature which we have noted in all of the cases cited above, and that is the fact that in none of them was the contemnor at any time during the trial notified that he was in contempt of court but rather the court waited until the conclusion of the trial and then, "out of the clear blue," cited the contemnor on numerous counts of contempt and forthwith passed sentence.

Taylor was warned upon each occasion of his contemptuous action and of the court's holding that he was in contempt. Therefore, the action of the court was not an unexpected event.

Although we have discussed the disqualification of the trial judge and the circumstances of disqualification, we feel that a great deal of consideration should be given to the holdings of the Supreme Court in Ungar v. Sarafite, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). Ungar, an attorney, was a prosecuting witness in a state criminal trial. However, he sought to exercise rights which he claimed to have as an attorney to dictate to the court the types of questions that he would answer, questions he would not answer, and to require rephrasing of questions if he did not

like them. He constantly refused to heed the court's instructions to answer questions and was argumentative and critical of the court's rulings. Ungar was cited for contempt and the court, without the intervention of a jury, sentenced him to ten days' imprisonment and imposed a fine. Ungar claimed his constitutional rights to a fair hearing were violated because the contemptuous remarks made by him were a personal attack upon the judge which necessarily biased and disqualified him. However, the Supreme Court held that Ungar's strong objections to the orders of the court and his conduct during the examination and a flat refusal to answer questions when directed by the court, together with his intemperate and strongly worded comments on the propriety of the court's ruling, were not sufficient grounds upon which to bottom the constitutional rule of disqualification. The court further held that the characterization of Ungar's conduct as contemptuous, disorderly, and malingering was at most a declaration of a charge against him and was not a constitutionally disqualifying prejudgment of guilt.

We are of the opinion in this case that although the remarks of Judge Hayes were inappropriate, in the light of the obvious guilt of Taylor these remarks were not such a showing of bias as to require the disqualification of the judge.

Taylor claims that under KRS 432.260 the court could not imprison him for more than thirty hours without the intervention of a jury.

This section limits contempt punishment to a maximum fine of $30 or imprisonment for not more than thirty hours without the intervention of a jury. The constitutionality of this section has been seriously questioned upon a number of occasions. A similar section, KRS 421.140, fixes the maximum punishment of a witness charged with contempt at a fine not exceeding $30 and imprisonment not exceeding 24 hours.

In Arnett v. Meade, Ky., 462 S. W. 2d 940 (1971), we held that the limits prescribed by KRS 421.140 materially interferred with the administration of justice and were, therefore, unconstitutional. Although efforts have been made to distinguish KRS 421.140 and KRS 432.260, we believe that such is a distinction without a difference. We have now concluded that for the same reasons as set out in Arnett v. Meade, supra, the limitations imposed by KRS 432.260 likewise constitute material interference with the administration of justice and, therefore, we hold such limitation to be unconstitutional.

Taylor next claims that even if the court had the authority to summarily sentence him for contempt, a sentence of three and one-half years without the intervention of a jury violates the 6th and 14 Amendments of the Constitution of the United States. Taylor is rather loose in his designation of the sentence imposed which he has tended all through this appeal to designate as three and one-half years. The truth of the matter is, as shown by the record, that Taylor was sentenced on eight separate charges of contempt, six of said sentences being for six months, one for ninety days, and other (sic) for sixty days. As we total all of them we, of course, come up with three years and five months. However, as far as this court is concerned we will treat them as separate sentences and not as a totality and shall so discuss them.

The Supreme Court has held upon a number of occasions that criminal contempt occupies the same position as any other criminal offense on the question of whether or not the contemnor is constitutionally entitled to a jury trial. If the offense was "petty," with the sentence being not more than six months, a jury trial was not required while if the offense was "serious," with the sentence being in excess of six months, the contemnor was entitled to a jury trial.

In Bloom v. Illinois, 391 U. S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968), the court held that in contempt pro-

ceedings where there was no maximum penalty, as we now have held, the seriousness of the offense for the purpose of determining whether or not a jury trial was constitutionally required is determined by the penalty actually imposed.

In Frank v. United States, 395 U. S. 147, 89 S. Ct. 1503, 23 L. Ed. 2d 162 (1969), the court held that sentences for criminal contempt up to six months may be constitutionally imposed without a jury trial, while in Cheff v. Schnackenberg, 384 U. S. 373, 86 S. Ct. 1523, 16 L. Ed. 2d 629 (1966), the court ruled that sentences for criminal contempt exceeding six months may not be imposed by federal courts absent a jury trial or a waiver thereof.

As these rules are based upon the constitutional right of a party to a trial by jury, they would apply equally to proceedings in a state court. It might be well to add at this point that there was not before the court in any of the cases cited the question of what is termed "aggregate sentences" for the purpose of determining the constitutional right to a trial by jury. No sentence meted out upon the charges against Taylor exceeded six months. Therefore, in the light of the cases above cited, Taylor was not constitutionally entitled to a trial by jury, and the sentences were not violative of any of his constitutional rights.

In United States v. Seale, U. S. Court of Appeals, 7th Circuit, 461 F. 2d 345 (1972), the court reaffirmed the rule that the 6th Amendment right to trial by jury applied to serious criminal contempts and that in determining whether or not such contempt was "serious" the courts were required to look at the penalty actually imposed. The court then held that for the purpose of determining whether or not a contemnor was entitled to a trial by jury it would be necessary to look to the aggregate of the sentences and not to the sentences separately. In other words, the rule in Seale is such that we must total the penalty imposed by each sentence for the purpose of determining whether or not a contemnor is constitutionally entitled to a trial by jury.

Taylor claims that the rule in Seale is controlling in determining whether or not his criminal contempt was serious and the sentence thus invalid because he was not granted a jury trial. The trial court on it original charges of criminal contempt ordered that the sentences be served consecutively. This court permitted the trial court to later file a corrected judgment reducing the number of acts of criminal contempt charges and amending the sentences imposed.

The corrected judgment does not direct that the sentences, as amended, be served consecutively; therefore, they must be served concurrently. Thus, the totality of the sentence actually imposed is a jail sentence of six months.

Seale does not apply here, for no matter how we aggregate the sentences we always come up with a total penalty of six months in jail. In Bloom v. Illinois, 391 U. S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968), the guidelines established by the Supreme Court predicate the constitutional right to a jury trial upon a determination of the penalty actually imposed.

The penalty actually imposed on Daniel Taylor is six months in jail. He was not entitled to a jury trial. Frank v. United States, 395 U. S. 147, 89 S. Ct. 1503, 23 L. Ed. 2d 162 (1969).

We hold that the sentences imposed on Daniel T. Taylor, III, must be served concurrently; viz.—one six month jail sentence, and except for this holding the judgment of the lower court adjudging him in contempt of court and fixing the penalty for each act of contempt is hereby affirmed.

Finally, Taylor appeals from an order which provided that as he had been found in contempt of court he was henceforth prohibited from the further practice of law in Jefferson Circuit Court, Criminal Branch, Second Division.

This court has for a number of years exercised the sole right to fix requirements for admission to the Bar and has likewise had the exclusive authority to discipline or disbar

attorneys. Cf. Ratterman v. Stapleton, Ky., 371 S. W. 2d 939 (1963).

However, long before the court assumed jurisdiction of disciplinary actions, suspension was not a permissible punishment for criminal contempt and this has been the rule in this Commonwealth since Adams v. Gardner, 176 Ky. 252, 195 S. W. 412 (1917).

The order and judgment prohibiting Taylor from the practice of law in the Jefferson Circuit Court, Criminal Branch, Second Division, is hereby reversed.

Palmore, C. J., and Milliken, Osborne, Reed, Steinfeld, and Stevenson, JJ, sitting.

All concur.

ORDER OF THE COURT OF APPEALS OVERRULING PETITION FOR REHEARING
June 15, 1973

Petition for Rehearing Overruled—June 15, 1973

THE COMMONWEALTH OF KENTUCKY
The Court of Appeals
73 Term—March 23, 1973

Daniel T. Taylor, III

v.

John P. Hayes, Judge Jefferson Circuit Court

File # W-311-72

Appeal from a judgment of the
Criminal Branch—2nd Division
Jefferson Circuit Court
144805

AMENDED MANDATE

The Court being sufficiently advised, it seems the judgment herein is erroneous in part.

It is therefore considered that said judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein, and that the appellee recover of the appellant ten percent damages on that part of the judgment

affirming and superseded herein; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended in this court.

A copy—Attest:

(s) Frances Jones Mills. C. C. A.

Issued June 15, 1973.

CORRECTED JUDGMENT AND CERTIFICATE OF CONTEMPTUOUS ACTION IN THE PRESENCE OF THE TRIAL COURT

March 2, 1972

I hereby certify that the following contemptuous actions were committed in the Commonwealth vs. Narvel Tinsley and William Michael Tinsley, which trial commenced October 18, 1971, and continued from day to day, except Sunday, thereafter through October 29, 1971. This court finds that the acts, statements and conduct of Daniel T. Taylor, III, the defendant in this contempt judgment, and the attorney on behalf of the defense for Narvel Tinsley, constitute (1) an attempt to prevent by improper means the proper functioning of this court; (2) a deliberate attack upon the administration of justice; and (3) mis-conduct by an attorney at law in practice before this court as would be calculated to destroy all respect for this court both by attorneys at law in practice before this court and by members of the general public if such mis-conduct went unnoticed and unpunished. The Tinsley case involved the trial of two black men on a charge of murdering two white, City of Louisville Police Officers. Mr. Taylor, on behalf of Narvel Tinsley, attempted to make a "Political" trial thereof and his misconduct, as hereinafter set out, made the task of keeping order in the court room and proceeding with a proper and fair trial to both the defendants and the

Commonwealth most difficult. It would be quite difficult for this Honorable Court of Appeals to understand and fully appreciate the full extent of Mr. Taylor's mis-conduct because this could be learned only from actual presence in the courtroom throughout the trial and actual observation of the manner in which Mr. Taylor conducted himself. Not unmindful of the fact that a transcript of record cannot express the tone of voice, derogatory expressions, and manipulation of hands and body, I am hereby making the entire transcript of testimony and proceedings, and the official tape recording of this trial as the record in this case. Although there is no comparable rule in the Kentucky Rules of Criminal Procedure, the following Certificate of Contempts are patterned in accordance with Fed. Rules Cr. Prac. Rule 42:

Contempt 1. Mr. Taylor, in questioning a prospective juror, on the second day of Voir Dire, repeatedly ignored the Court's order not to continue a certain line of questioning and to ask his questions of the jury as a whole, He evidenced utter disrespect for prospective jurors (T.E. 335-347).

Contempt 2. The court sustained the Commonwealth objection on the use of a prior statement to cross examine Officer Hogan and not to go into the escape of Narvel Tinsley. Mr. Taylor repeatedly and completely ignored the court's ruling (T.E. 1071-1080).

Contempt 3. During the playing of a tape recording of the voice of witness David White, Mr. Taylor wrote on a blackboard. After the playing of the tape it was ordered that the blackboard be removed from the court and Mr. Taylor was advised by the court that he could use it in his final summation to the jury. Mr. Taylor was disrespectful to the court by his tone of voice and manner when he replied, "I'll certainly keep that in mind, your Honor" (T.E. 1355).

Contempt 4. During cross-examination of Narvel Tinsley, by Mr. Schroering, Mr. Taylor interrupted and moved for a recess, was overruled by the court, and then became most disrespectful to the court and refused to take his seat at counsel's table as ordered.

Contempt 5. Complete and utter disrespect by Mr. Taylor in the questioning of Mr. Irvin Foley, and (sic) attorney and Legal Advisor to the Louisville Police Department when he continually disobeyed the court's ruling regarding a press conference which the court had ruled on unadmissible (sic). Mr. Taylor accused the court of disallowing admittance of black persons in the courtroom during the examination of this witness and made a statement in the presence of the jury inferring that only white police officers could enter the courtroom. It has always been the rule of this court that there will be no interruption during the examination of a witness or during closing arguments by people coming and going into and from the courtroom, which rule was known to Mr. Taylor, (T.E. 1950-1955).

Contempt 6. The witness Jesse Taylor, a Louisville Police Officer, read a statement by witness, David White. A Ruling was made by the court that the statement spoke for itself, had been introduced in evidence and could not be commented on by Officer Taylor, who merely took the statement. Mr. Taylor continued to disregard the court's order and ruling by continually reading parts of the statement out of context (T.E. 2008-2016).

Contempt 7. Mr. Taylor in examining Mr. Norbert Brown, again referred to a press conference that the court had previously ordered him not to go into. He also waved his arms at the witness in a derogatory manner indicating the witness was not truthful and

showing utter contempt of the court's ruling (T.E. 2030-2032).

Contempt 8. The court directed Mr. Taylor to call his next witness. He called Lt. Garrett, Louisville Police Department. After the witness was sworn and took the stand, a deputy Sheriff advised the court that Mr. Taylor's aide was not searched, as everyone else had been upon entering the courtroom. Mr. Taylor ordered the deputy to search his aide. The court ordered Mr. Taylor to begin his examination, which he refused to do until he was cited for contempt in the court's chamber (T.E. 2068-2069).

Contempt 9. Mr. Taylor repeatedly asked the same question of witness Floyd Miller that the court had held improper. He was also disrespectful in his tone of voice when referring to a certain police officer as "this nice police officer" (T.E. 2169-2172).

At the conclusion of the trial and after the jruy had returned their verdict, Mr. Taylor was brought before the bench and sentenced as follows:

Count 1	—	30 days in jail
Count 2	—	60 days in jail
Count 3	—	90 days in jail
Count 4	—	6 mos. in jail
Count 5	—	6 mos. in jail
Count 6	—	6 mos. in jail
Count 7	—	6 mos. in jail
Count 8	—	1 year in jail
Count 9	—	1 year in jail

This court obviously was mistaken in the number of contempts and has permission of the court of appeals to correct this mistake. Accordingly, Count One, which was changed to a warning, is hereby deleted and held for naught.

The two counts whereby Mr. Taylor was sentenced to one year in jail on each count are hereby reduced to six months in jail on each count as dictated by the Sixth Amendment of the United States Constitution and the case of *Frank* v. *United States*, 395 U. S. 147 (1969). The judgment should read:

Count 1	—	60 days in jail
Count 2	—	90 days in jail
Count 3	—	6 months in jail
Count 4	—	6 months in jail
Count 5	—	6 months in jail
Count 6	—	6 months in jail
Count 7	—	6 months in jail
Count 8	—	6 months in jail

In accordance with the order of the court of appeals, entered February 21, 1972, the Circuit Court Clerk shall certify the above corrections in the record being prepared on appeal and shall certify copies of this corrected judgment to the defendant, Mr. Daniel T. Taylor, III.

Entered this 1st day of March, 1972.

/s/ John P. Hayes
Judge

I hereby certify that a copy of the foregoing was mailed to Mr. Robert A. Sedler, Attorney at Law, University of Kentucky, Lexington, Ky., this 2nd day of March, 1972.

/s/ Art DeWitt, D.C.

PROCEEDINGS UPON IMPOSITION OF PUNISHMENT FOR CONTEMPT
October 29, 1971

Transcript of Proceedings in Commonwealth v. Tinsley, pp. 2288-2291

The Court: Mr. Taylor, the Court has something to take up with you sir, at this time.

Mr. Taylor: Well, I'll be right here, Judge.

The Court: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean it's based upon planned confusion.

Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule.—

Mr. Taylor: (Interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that

a court is conducted. This is not the way an officer of a court should conduct itself.

Mr. Taylor: I would respond to you, sir—

The Court: (Interrupting) You're not responding to me on anything.

Mr. Taylor: (Interrupting) Oh yes, I will.

The Court: Yes, you're not, either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One—

Mr. Taylor: (Interrupting) Unless you intend to gag me—

The Court: (Interposing) I'll do that—

Mr. Taylor: (Interposing) My lawyers will respond to you—

The Court: (Interposing) I'll do that, sir.

Mr. Taylor: My lawyers will respond to you, sir.

The Court: You be quiet, or you'll—there will be some more contempts—

Mr. Taylor: (Interrupting) No, you heard what I said.

The Court: I have you nine counts. First Count, 30 days in jail; Second Count, 60 days in jail; Third Count, 90 days in jail; Fourth Count, six months in jail; Fifth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

Take him away.

Mr. Taylor: We will answer you in court.

The Court: I'd be glad to see you.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS IN *COMMONWEALTH v. TINSLEY*, October 18, 1971 Through October 29, 1971

[347]

The Court: The Court's making a ruling at this time that it is recessed from 12 until 1:30. By 1:30 I want written questions from each attorney. The Court is taking over the voire dire. I will ask the questions. I am also holding Mr. Taylor in contempt of Court for his actions this morning, not only in—I repeatedly had to tell him you've asked that question, you've asked that question. He goes over the same question, he pays no attention whatsoever to the Court's ruling, and also I noticed this morning—I want this in the record—that two newspaper reporters were seated on the front row. I had no problem with Mr. Taylor yesterday when these people weren't there.

I'll make my decision on what the punishment is going to be at the end of this case.

Mr. McCall: Judge, insofar as William Michael Tinsley is concerned, we object to the Court's ruling and would ask the Court to allow us leave to ask questions individually on behalf of that defendant.

The Court: I'm going to ask the questions.

[348]

Mr. Taylor: Your Honor, may I respond to the record, please?

The Court: Yes, sir.

Mr. Taylor: Thank you. I would like at this time, in regard to the first ruling of the Court, to state that this is a capital case and I suppose one of the most heinous that's ever been around here and so forth where we have had to labor under every disadvantage. Your Honor has issued a rule and then the magazine came out anyway. You know, I've been over that and over that. The brokerage house—

The Court: (Interrupting) I've heard that, Dan, a hundred times. I realize what you're trying to do. You've got a job to do, but on the other hand, it's my opinion—I think you're putting on a show. That's my opinion—

Mr. Taylor: (interposing) I'm sorry you think that, Your Honor.

The Court: —from your actions, what you do in Court.

Mr. Taylor: Let me say this to Your Honor. Even at the present time there are other commitments, without going into them, that I really wish I could be working on, you see. That's my problem.

[349]

Indeed, I'm going to ask you if you won't call the Fayette Circuit Judge and help me in regard to a matter of next week. I think we will be here next week, possibly.

Now, a proper voire dire is vital and it's not always pleasant because it's been my experience people who are up there being talked to are inclined to possibly—what shall I say, hide behind certain generalities of accepted conduct. What I'm saying, Your Honor, they're not always perfect. It's a human tendency.

The Court: The Court recognizes that. I have never seen a completely fair and impartial human being.

Mr. Taylor: Nor have I. By asking us to submit our voire dire questions in writing, in the first place, in the first place, it's tremendously—even, let's say arguendo that the Court's position should be correct in this matter—it works a tremendous prejudice against the other lawyers in the case.

The Court: I realize that. I don't think you do.

Mr. Taylor: Well, I certainly do, but I don't think my voire dire was improper or I wouldn't be going through it. If you think I enjoy

[350]

going to that hell hole in that jail over there—

The Court: (interrupting) I didn't say I was going to put you in jail.

Mr. Taylor: Well, if you think we've got any money, I haven't. I don't mean that arrogantly, I'm just talking about—I have got enough problems without seeking further ones. However, nobody is begging or weeping on that point. We'll just have to take what comes. The problem is this kind of thing, I think, dissuade younger men from coming into practice and so forth. They get to thinking that in order to—

The Court: (interrupting) It seems to me very obvious that if you want to know if this particular person has prejudged a case and already formed an opinion, that's a very simple question to ask, instead of going through, "Have you seen the fence?" It's got nothing at all to do with this case.

Mr. Taylor: Your Honor, please, I—

The Court: (interrupting) I think that's the mistake I made when I started out by saying that I was going to let you have a completely open voire dire. That's the last time I'll ever do that.

[351]

Mr. Taylor: Can we talk—do you mean with me?

The Court: With everybody.

Mr. Taylor: Including me?

The Court: Including you and everybody and the Commonwealth, too.

Mr. Taylor: Judge Hayes, will you recognize then, sir, please by 1:30 just mechanically we couldn't have the questions to you and you say, "Well, if you don't—

The Court: You have an hour and a half.

Mr. Taylor: Well, may I ask you, please, to reconsider the ruling and let us conduct the voire dire? I would make—may I request to be off the record, please?

(Whereupon, an off-the-record discussion was had.)

Mr. Taylor: May I say, respectfully, to Your Honor, as you have indicated that you intend to hold myself in contempt of Court, certainly, there hasn't been any intention on my part in anyway to do other than defend my client under our canons of ethics

[352]

and proper law and so forth, now, Your Honor, please, the Court having just told me that you have got me in contempt of Court constitutes such a psychological blow as to impair in great portion, in great manner, my ability to continue with the adequate defense of this young man here accused.

Now, I say that for the following reasons, Your Honor, heretofore in experiences like this I have found, I have learned just exactly what is entailed in defending one in a situation like that, plus the other commitments that I have in the office beyond this case, in which we are serving without pay, which requires that I have reasonable anticipation, if possible, of how I'm going to spend my time in the next few days. This involves particularly the case pending for trial in Lexington, Kentucky.

I am going to have to, in the circumstances, ask Your Honor and move Your Honor to move for a mistrial as to Narvel Tinsley and to reassign for trial, if Your Honor— I think we would probably want to do some research and I've found the Court fair in the past from the standpoint of giving counsel an opportunity to present whatever legal position he has in this situation, or any other situation— Your Honor, I think, would understand, as I read the case law, that if

[353]

I am held in contempt mid-trial, I say this respectfully under due process I would want to know particularly what for. Your Honor has mentioned what you feel your reasons are, but this being the case, here we are without a jury

even in, the worst case I've never defended, working for nothing, qualifying the jury, going into the second day of trial with an extra panel in, all sorts of conflict set theoretically from the antagonistic defenses here, and so forth, the responses of the jurors that have gone on this morning and I suggest respectfully to Your Honor it offends due process for me to have to continue this case under those circumstances if, indeed, Your Honor is set and—pardon me, please—determined on the proposition that Your Honor's going to hold and punish me for contempt, well, I can only ask the Court to, No. 1, declare a mistrial as to Narvel and remand him back to custody and reset him for trial. I think the cases support me in this and I stated to you my reasons. It's hard enough under the circumstances to defend the case and it goes beyond, I think, the capability of any ordinary, or maybe more than ordinary, person to continue to work under those circumstances. It constitutes—I mean this respectfully and not personally, but from my standpoint, subjectively a harassment, intimidation, threat and danger and fear as to cause me to not be

[354]

capable of continuing to put my whole mind on the problem before me, which is the adequate defense of my client here charged with murder.

Your Honor has mentioned the newspaper guys. I don't have control over where they sit and so forth. I say further to you, Your Honor—of course, you're the one making the judgment, as far as that goes. I don't know of any intention to make today any different from yesterday. I am offering, since we have offended the Court, if you will reconsider your holding to take the voire dire away from us that I will defer to my brothers, Scott, Fleming and McCall, because we have been able to communicate with each other. Wouldn't that be an option that we might consider, Judge Hayes?

The Court: Well, I can't—

Mr. Taylor: (interrupting) And let them continue with the verbal voire dire?

The Court: What do you all say about it? I don't think, legally, I have to—if I take it over I have to give them the chance to at least offer some questions. I just can't completely take it away from Mr. Taylor and his client, with no opportunity—

[355]

Mr. Schroering: (interrupting) Judge, I think it would be more orderly if the Court would continue with what it has already suggested and that is take over the examination of the jury upon questions submitted by counsel. I feel that under those circumstances it might very well be interpreted the Court would be denying Mr. Taylor if you do it any other way.

Mr. Fleming: He can waive in our favor. Judge, this is incredible, absolutely incredible that we sit here like bumps on a log and because you are displeased with the way Mr. Taylor has conducted himself—and I'm not expressing my views one way or the other on that, I have no status—by the same token, I don't think that the Court should place us in a position of being denied the opportunity to perform at least up to the point where you say you're doing it just like Taylor, so now you're out.

The Court: I agree with you there, Mr. Fleming.

Mr. Fleming: Judge, this is a capital case. We've got a kid that is charged with shooting a policeman. We know from the evidence that that is an irrefutable fact. He shot that policeman and to just sit there and throw a bunch of written questions at a bunch of people, we might as well try the case on a

[356]

computer.

Mr. Taylor: Why don't you do this, if Your Honor

please, if you want me to submit you some written questions and not hurt the others, isn't that fair? You know, they haven't even—respectfully said—done anything.

The Court: I realize that and that's the only reason I hate to do it. It's none of their fault, really.

Mr. Fleming: If he is willing to waive, I don't see what possible error there could be.

The Court: Well, if he will put that in the record.

Mr. Taylor: What are you going to do about holding me in contempt and making me continue with the trial?

The Court: Well, are you telling the Court that you are not going to continue the trial?

Mr. Taylor: Now, wait a minute, please. I'm not stating in any way that I am not following, that it's my intention to not follow any order of this Court. I live under the law and that's always been what I meant to do and that's my future intention. I—

[357]

The Court: (interrupting) In other words, if I say your motion is overruled and that the trial will continue, you will continue?

Mr. Taylor: Well, I'm certainly going to follow the Court's order, yes, sir. I am not in anyway stating to Your Honor that anybody is planning on anything illegal or silly or unfair or overly dramatic or walking out. That's absurd, at least, from the way I see what my responsibility is. I would have to continue on under what I consider to be an almost insupportable burden, that is psychologically. You might not think this bothers me, but let me assure you otherwise. It's, I think, one of the most—and this is not meant personally—unfair situations a lawyer finds himself in when contempt starts coming down. People write articles about him and everything else, and I'm sure Your Honor—

The Court: (interrupting) This is not my fault.

Mr. Taylor: Well, you know, I don't even know, seriously, what the this is that's bothering Your Honor, but Your Honor is running this Court, not me.

The Court: That's right.

Mr. Taylor: Yes, sir. I've conceded that all along, of course.

[358]

The Court: Maybe you all had better discuss the case. You want to discuss with Mr. Taylor out in the hallway, or something?

Mr. Taylor: If we might, I mean, yes, sir.

The Court: Let the Commonwealth, too, if you wish.

(Whereupon, a conference was had between all defense counsel, out of hearing of the reporter.)

Mr. Fleming: I just want to get this motion in the record at this time. The defendant, William Michael Tinsley, again renews his motion for a severance on the ground that there appears to be some sort of conflict between counsel for the co-defendant and the Court and that as the result of this difficulty, William Michael Tinsley's defense is prejudiced.

The Court: Overruled.

I'm going to reconsider my order holding Mr. Taylor in contempt and change it to just a warning at this time. I think still that I'm going to require he and the Commonwealth to submit their questions in writing.

CONTEMPT CITATION RESCINDED

[359]

Mr. Taylor: Yes, sir. Can I just ask Charlie something?

The Court: (Nodding head affirmatively.)

(Conference between Mr. Taylor and Mr. Scott, out of hearing of the reporter.)

Mr. Scott: Judge, now are all parties to submit questions?

The Court: No, you are not.

Mr. Scott: Is Mr. Taylor going to be allowed to read his questions to the jury, or is the Court going to do it?

The Court: I'll have to look at them first.

Mr. Taylor: Do you think there might be some possibility of that?

The Court: There might be a possibility. You give me the questions and if they are proper, I'll let you ask them.

Mr. Taylor: All right, and I'll ask the panel as a whole.

The Court: Now, the questions I say are improper I don't want you to go ahead and ask them after I've already told you—

[360]

Mr. Taylor: (interrupting) Judge Hayes, I'll make you a carbon and we'll read them by rote together. Now, would it be possible—and if it isn't, we'll figure some way to do it otherwise—for us to waive, and I'll get my client to put on record, my being in the courtroom until 2:00 o'clock so I can fix it for you?

The Court: We'll just wait until 2 before we start.

Mr. Taylor: All right. Let the record show that I understand what the Court has just said and consider myself under the jurisdiction of the Court.

Mr. Scott: Judge, I have one thing to cover for the purpose of the record. The defendant, William Michael Tinsley—

The Court: (interrupting) You're excused.

Mr. Taylor: Thank you.

Mr. Scott: The defendant, William Michael Tinsley, joins with Mr. Taylor in his objection to the Court refusing challenge for cause or strike for cause, of Mr. Bennett, the panelist, on the ground that he clearly indicated that he was prejudicial in favor of police testimony and for the reasons that Mr. Taylor

[361]

previously indicated.

The Court: I truthfully don't think that's grounds. I might be wrong, I don't know. It's a very close question.

Mr. Fleming: In that regard, I would say I had difficulty hearing the man, as I have had everybody, but I think that at one time he said he was inclined to believe the Commonwealth's case and indicated that he was more inclined to believe their case and I think that statement would disqualify him.

The Court: I think that you guys should go into him further, quite frankly.

Mr. Fleming: We'll have an opportunity to do that.

The Court: There's nobody knows what has happened in this case in this Chambers, except us, right? (All counsel nodding heads affirmatively.) So, if the newspapers get hold of this—I'm telling everybody not to discuss this with the newspapers.

(End of proceedings in Chambers.)

* * * * * * *

[545]

(Conference at Bench, out of hearing of jury.)

Mr. Ousley: You're letting him go all over the place, again.

The Court: I'm going to make him stick to it—

Mr. Schroering: (interrupting) May it please the Court,—

The Court: (interrupting) He didn't get an answer. He's got a right, until he gets an answer—

Mr. Schroering: (interrupting) Counsel for the defendant is not following the questions which he submitted to the Court and the Commonwealth, therefore, objects to the manner in which he's conducting the voire dire, in view of the previous rulings of the Court.

(End of proceedings at Bench.)

The Court: Ladies and gentlemen of the jury, I'm going to send you to your jury room for a short recess, with the same admonition. Don't discuss the case or form any opinion. Don't even talk about it.

[546]

IN CHAMBERS

The Court: What do you want to put in the record? I'm going to tell him he is going to read the questions and not vary one bit, but don't you all, you know, the last time, before he got an answer, somebody over there—you all were talking, and I can't blame the guy too much for that, but on the other hand, he is getting away from the questions and knowing him, if you give him an inch, he'll take a mile. I might as well sit on him now.

Mr. Schroering: Outside, Judge, at the Bench, I objected to the manner in which he was asking the questions and the questions that he asked for the simple reason that heretofore the Court had ordered both the Commonwealth and Mr. Taylor to submit questions on voire dire which is in the record, and admittedly, from time to time, additional questions might vary from those presented to the Court, but I believe Mr. Taylor has, this morning, consistently asked questions that were

[547]

not approved previously by the Court on submitted questions on voire dire. I believe this is deliberate and continual on his part. This is the reason why the Commonwealth has objected to the questions which he has just asked on voire dire.

Mr. McCall: Judge, I would like for the record to reflect that the Court made some remark, "You all badgered the jury yesterday all day," and I want the Court to know—

The Court: (interrupting) Well, I—

Mr. McCall: (interrupting) I want the Court to know that neither myself, nor Mr. Fleming—

The Court: (interrupting) I wasn't addressing that to you all, it was strictly Mr. Taylor. But, I'm not going to permit that either, on either side.

Mr. McCall: I think he's across the hall. I can go find him.

The Court: I don't care if he gets in here, or not. There's no reason why he can't read his questions and get an answer.

I would appreciate it if everybody would just sit down and not get up and be running around all the time.

Mr. McCall: Judge, you just can't hear.

Mr. Fleming: I can't hear. Where

[548]

Carl's sitting and Ed and Danny's sitting you can hear them.

The Court: I know, but you guys are seated right beside him and you still can't hear?

Mr. Fleming: Oh, there I can.

The Court: I don't object to you sitting there, at all. The only thing I'm saying, everytime that some of you want to make an objection, you feel like you want to go to the Bench. All you have to do is say I object. If it's something that requires a hearing, we'll have it. For instance, everytime somebody says yes, I'm opposed well, it's like the troops coming in and everybody gets up. We'll get it all in the record and note an objection to protect it for you that in every instance in this matter, you're got an objection.

(Whereupon, the Judge sent for Mr. Taylor.)

The Court: O.K. Put this in the record, since Mr. Taylor's here—

Mr. Taylor: (interrupting) Your

[549]

Honor, I'd have been here before, if I had known you wanted me.

The Court: You were on No. 5. Now, Mr. Taylor, I'm going to tell you that you have to read your questions—

Mr. Taylor: (interposing) Yes, sir.

The Court: —verbatim, and no other comments, whatsoever. Also, I have told them I don't want them interrupting you.

Mr. Taylor: Thank you. Now, may I do this, just to protect the record, please? May I just enter an objection to voire dire being limited and, that motion having been made, may I respectfully call the Court's attention to the fact that Mr. Schroering submitted a list also. I'm not making any stickler for him being within his list. I'm just kind of talking about the equities.

The Court: Well, he's going to stick to his, too.

Mr. Taylor: Thank you, Your Honor. Stick within the list, yes, sir. Thank you.

The Court: Does everybody understand everybody?

Mr. Taylor: May we be off the record?

* * * * * * *

[1080]

IN CHAMBERS

The Court: Gentlemen, we are back in Chambers again, let the record show. Once more, as the result of Mr. Taylor's completely ignoring the Court's rulings. This time it is not a warning. It's contempt of Court and the Court so finds.

I have repeatedly ordered him not to get into this escape. It has nothing to do with this case. I've repeatedly ordered him to stick to the—on cross-examination —basically what's been brought out on direct. He completely ignores that. And the antics he's going through in Court is another reason I'm holding him in contempt. I can't warn you anymore, Dan. What I say to you goes—just like pouring water off of a duck. I don't think it soaks through.

Mr. Taylor: Let me respond to the record, if you so desire, please?

The Court: Go right ahead.

Mr. Taylor: Is that now, Your Honor?

The Court: Yes.

Mr. Taylor: Now, Your Honor takes

[1081]

the position that you have warned counsel to stay away from the escape features. I sincerely—I don't say that I've caught every word that's been said. That was one of the submitted questions on voire dire. I've forgotten the number, but it's fairly early in the sequence of them. Now, I took it from that to mean that the Court considered that inquiry in that area could be made.

Now, let me tell you my reasoning. I'm asking them on voire dire—

The Court: (interrupting) You asked them if the fact that they had or they had read something—

Mr. Taylor: (interrupting) No, no—with all respect to the Court, I can tell you almost verbatim, sir, Your Honor.

The Court: I've got it here, too.

Mr. Taylor: All right, would you please, refresh yourself, please?

The Court: It was basically that he shouldn't be tried for that on this case, which I had no objection to and which is proper, but you can't go into the fact when you arrested him and had the carbine on him, was he loaded.

[1082]

That's got absolutely nothing to do with this case.

Mr. Taylor: Let me tell you, if you please, Your Honor, may I show you what the theory of defense is in that regard. We're out of the hearing of the jury. Fair enough? I mean, may I attempt to do that, pelase?

The Court: (Nodding head affirmatively.)

Mr. Taylor: Your Honor, Judge, here is—the main aspect of this case has to do—this is no tale out of school—it has to do with the Schaefer slaying. I think it is—well, I don't want to damage Messrs. Fleming, Scott or McCall in any way, so, let me state it this way. I think the Commonwealth has a clear, strong defined theory—I'm not averring that it's going to succeed or anything, in regard to the slaying of Officer Hayes and, I believe, from the opening statement and what has come out so far and my familiarity with the case, Your Honor, that is going to be, more or less, the problem of the person defending William Michael Tinsley, and not Narvel.

Therefore, Your Honor, the case boils down to what you will see as the case goes on, to a non-witnessed slaying of Officer Schaefer. Now, obviously,

[1083]

and I don't mean this is any gruesome or disrespectful way, but only to make the point I'm trying to reach here, Your Honor, obviously Officer Schaefer did not, pardon me for putting it so bluntly, slay himself, nor do I consider it within the realm of possibility, Your Honor, that the other officer did anything to Officer Schaefer.

Therefore, what we're going to get down to here is the reaction and you might say, it's an overused word in the law, but the proclivity of Narvel Tinsley, and I'm suggesting to you that I'm not trying to gain some psychological point over this witness. He's a hard-working police officer. I'm saying to you that it's germane to my theory of defense that Narvel was unarmed when he was captured after he escaped.

Now, does Your Honor feel that that is too far fetched?

The Court: Well, truthfully, I think it is when you've got testimony under oath—of course, you weren't in the case over in Juvenile Court.

Mr. Taylor: What are you saying?

The Court: I don't know if I'm spilling the beans here or not, but the testimony under oath that's part of the record with

[1084]

somebody's motion that he was, the night of the—the night of the—

Mr. Taylor: (interrupting) That he was what, please?

The Court: Armed. That's the important thing.

Mr. Taylor: I know that, Judge.

The Court: Not three, six months later when they found him someplace, he wasn't armed. I don't think—

Mr. Taylor: (interrupting) Judge, he was armed and he placed his pistol under a rock?

The Court: Right.

Mr. Taylor: Right.

The Court: What's the fact—when was he arrested the second time?

Mr. Taylor: The second time, on the 5th of October.

The Court: From the 5th of May, what's four or five months got to do with it.

Mr. Taylor: I'm talking about if this was a man who habitually went around armed, I'm talking about—don't you see that?

The Court: I truthfully don't. Not

[1085]

after—the whole escape thing, as far as I'm concerned, has nothing whatsoever to do with this trial.

Mr. Taylor: O.K., but don't you—

The Court: (interrupting) And, as I stated in the record, it's—Dan, it's not only that. You just can't follow the orders of the Court.

Mr. Taylor: Judge, Mr.—Captain Hogan is the one, Your Honor, who said that—what he's trying—look, Judge Hayes, he's trying to establish probable cause. Now, if Your Honor please, one of our motions in formal form, sir,

and pursuant to your deadlines, Your Honor, was that probable cause did not even exist, sir.

The Court: Which was overruled by the Court.

Mr. Taylor: Yes, Your Honor, but would you agree that I have a duty—I don't want to harp on it or anything like that, but as the case goes on I've got to show—we have to make objections.

The Court: Sure.

Mr. Taylor: As a matter of fact, Your Honor, pardon me, did I cut you off?

The Court: No.

[1086]

Mr. Taylor: As a matter of fact, that motion was coupled further with a fourth motion, wasn't it, or they get pretty well mixed up, in regard there was an actual serious motion made by all counsel, to suppress the introduction into evidence of the two 38 caliber pistols, to wit, the Charter Arms and the Rossi.

The Court: And before Hogan ever got on the stand I told the Court Reporter, I said put an objection to this man's complete testimony in the record for both defendants. That same motion I moved on previously is overruled again this time. Didn't you ask me to do that?

Mr. Taylor: Yes.

Mr. Fleming: (Nodding head affirmatively.)

Mr. McCall: Yes.

Mr. Taylor: Yeah, but still the case goes on. Now, here's what I want to say to you, Judge. You haven't, I suppose you wouldn't have any reason to, really, seen David Keith White's statement yourself, have you?

The Court: (Shaking head negatively.)

Mr. Taylor: Now, Your Honor agrees with us as a general proposition that Mr. Schroering can't put my file in evidence, you know, you ruled on that.

[1087]

The Court: I realize that.

Mr. Taylor: Would you understand what I'm driving at if—we're in camera here, or, at least, in Chambers. If you saw that David Keith White's statement does not at all say that Narvel shot anybody. Do you see then that—

Mr. Schroering: (interrupting) Man, what's that got to do with it.

The Court: I understand that it doesn't.

Mr. Schroering: Judge, he's—

Mr. Taylor: (interrupting) I sat right there and heard Captain Hogan say, sir, that he had gotten information from David Keith White that he shot—

The Court: (interrupting) From Siegfred Taylor and from somebody Miller—

Mr. Taylor: (interrupting) No, Judge, Your Honor, Captain Hogan said on the stand there that he had been told by David Keith White that William Michael Tinsley shot an officer and that Narvel Tinsley shot an officer. I heard him.

Mr. Schroering: Judge, that's not the testimony.

[1088]

Mr. Fleming: Judge, I'd like to interpose an objection here to the introduction of the statement of David Keith White at this point. Now, remember—somehow we get to the point William Michael isn't even in this case. He is in this case. As to William Michael Tinsley, this is hearsay testimony that you're putting into the jury.

The Court: That's what I—I mean, I assume all of you are lawyers, I assume all of you know this.

Mr. Fleming: On the question of probable cause, come in here and bring him in here and question him all you want to about probable cause and bring in all the hearsay you want to, but as far as William Michael Tinsley is concerned, if this statement goes in now, it's rank hearsay.

The Court: That's right.

Mr. Fleming: It's not David Keith White—

Mr. Taylor: (interposing) I'm not introducing it.

The Court: And you cannot—

Mr. Fleming: (interrupting) You're reading parts of it.

[1089]

The Court: You cannot take parts of it out and say Judge, your copy of David White's statement say that he shot anybody, or, you know—

Mr. Taylor: Your Honor, excuse me, were you finished?

The Court: It's not only that, but it's—well, the record will bear me out. I'm not going to say anything else.

Mr. Taylor: I'm going to say this, if I might, please.

The Court: You can say whatever you want to say.

Mr. Taylor: Thank you, Your Honor, thank you. Now, I am trying to stay within the confines of cross-examination. The officer, as I heard him testify, said, as I was—Virginia can find it in her notes. You all are toying—I don't mean this facetiously or disrespectfully, but—

The Court: Can you go back that far, Virginia?

Mr. Taylor: If you will, and I'll eat the machine—

[1090]

(Whereupon, an off-the-record discussion was had.)

Mr. Schroering: May I say this. In the statement White states in that statement that Narvel Tinsley, with a gun in his hand, chased Officer—the officer around the side of the car—

Mr. Taylor: (interrupting) Totally untrue.

Mr. Schroering: The only thing he doesn't say is he actualy saw him shoot the gun.

Mr. Taylor: That's totally untrue.

Mr. McCall: Judge, let's don't get all of this in the record, Judge. It's got nothing to do—

Mr. Taylor: (interrupting) I waive being on the record.

(Whereupon, an off-the-record discussion was had.)

Mr. Taylor: I'm saying—let me just finish, and then I'll shut up.

The Court: All right, go ahead.

Mr. Taylor: What I am—it's an extremely important—David Keith White is the pivotal witness in this case. Now, for the Lieutenant, sir, Your

[1091]

Honor, please, to get in the minds of the jury right now, which he did do, that White had given him such information when I know, Your Honor, I'm going to be able to, I think, hand David White his head in his hand—that's a figure of speech only—if he tries to maintain that position in view of that statement. I feel, not only inclined to cross on the subject, I feel it's my duty to defend my client, to point that out now. Now, you may feel otherwise. Another thing, Your Honor, that worries me, please, you say, "Mr. Taylor, I've repeatedly told you to not get into these cases." Honestly to goodness, I don't remember—now, I'm not talking I want to eat the machine stand on that. If it's in the record, or Your Honor has a clear recollection that you told me to stay away from this—the only point I'm trying to show is the boy was not armed then, you see? Now, Judge, we have to go against the F.B.I., the community, everything, and so forth and we are trying to stay within the law. I am sure that this is an honest mistake. I'm just about through with the witness. I cannot financially, and, I hate to use that word in connection with the practice and if it wasn't absolutely necessary, but I've got to use it, afford a second trial in this case if it can be avoided, consonant with my doing my duty. We've worked hard, we've got 14 people, one of which is sleeping through most of the trial, and

[1092]

possibly some inquiry might be made in that regard.

Mr. Schroering: May it please the Court, I have another witness who has to leave at 7'00. Could we interrupt the cross-examination here—

The Court: (interposing) He says he's about through.

Mr. Schroering: —and let this other witness get on.

Mr. Taylor: Look, I'd be glad to work out anything.

Mr. Schroering: May it please the Court, this is a deliberate effort on behalf of Mr. Taylor in his marathon of irrelevant questioning of these witnesses, to try to delay this trial so that this witness will not testify. Now, I've been through this before. I've been through it in the Geary case—

Mr. Taylor: (interupting) Judge, I said to Mr. Schroering at the noon break that I would do—and you all heard me say, some of you—I would do anything to convenience his officer, that we weren't going to have this kind of argument and for him to sit there now and—it's going on 4:00, and state otherwise, I don't believe he's accurate. If he's got another witness, if it's your ballistics man, I don't want to—he told me then, that is, Mr. Schroering, that he would put him

[1093]

on Monday morning and I, however, was not made privy to what was apparently a change of plan and I came bouncing over after the lunch break and said, "Where is the—

The Court: (interrupting) In any case, are you about finished with this man?

Mr. Taylor: Just about, or if you will reconsider, I'll—

The Court: (interrupting) I'm not going to reconsider anything. How many questions have you all got of the man?

Mr. Fleming: I want to make an objection when you get around to trying this case again.

The Court: That's what we're here for.

Mr. Fleming: I object to his making any inquiry into

probable cause which brings about bringing in hearsay statements—

The Court: (interposing) Right in front of the jury.

Mr. Fleming: —If you want to question probable cause and you want to use hearsay to establish it, back here is the place to do it, not out there. What he's trying to do, and I agree with him, that David White's testimony is the pivotal point on the whodunit phase of the case.

[1094]

The Court: Right.

Mr. Fleming: He's trying to put in the impeachment before the witness ever takes the stand.

The Court: That's right.

Mr. Taylor: Judge, you've got a witness here—excuse me.

Mr. McCall: Let me make a second motion, Judge. We've been getting kind of short-changed—

The Court: (interposing) I know you have.

Mr. McCall: We're all in a hurry and we'll let you get this witness off and put the F.B.I. agent on. We, at this time, renew our motion that we made yesterday, on the same basis that we argued in Chambers, and I want to add that a lot of things that are going on in the courtroom today are not getting into the record, through no fault of Mrs. Klapheke's, but there are side comments between Mr. Taylor and Mr. Schroering and the jury can see them, the people out in the audience can see them and they are depriving our defendant of a fair trial, and she can't possibly hear what's going on, but I'm close enough to see the faces being made and the statements being made and they are denying our client the right to a fair trial. We're renewing out—

[1095]

The Court: (interrupting) as far as that's concerned, the Commonwealth is also under the same rules. I don't want to hear anymore from your side either, unless they

want to make a specific objection and I don't want the objection argued by the Commonwealth or the defense attorneys in front of the jury. If you have an objection to make, hold up your hand or say you've got an objection. If you want to argue about it, approach the Bench.

Mr. Schroering: Does Your Honor want the reason for the objection?

The Court: Not in front of the jury.

Mr. Fleming: My motion is to set aside the swearing of the jury and grant a severance insofar as William Michael Tinsley is concerned and to dismiss the panel.

The Court: You have something else?

Mr. Taylor: Yes, sir.

The Court: Overruled.

Do you have something else?

Mr. Taylor: Your Honor, I want to move you to sever the cases and reset either one, however you want to do it and so forth. I would like to not be

[1096]

the whipping boy in this whole proceeding, and so forth. I think I have explained to you what the basis of my cross of Captain Hogan was and it had to do with he misstated what the Keith White information he received really was. Now, this happens, Judge Hayes, to be the pivotal point in the entire case.

The Court: Not yet.

Mr. Taylor: Your Honor, if it please, in my contemplation of how to defend the case, this is the fulcrum that it turns on. May I say to you most respectfully, we spent six weeks trying to prepare for this case, and this includes anticipating what the Commonwealth is going to put on. Now—

The Court: (interrupting) But there are rules of evidence and I assume all attorneys know those rules, that you've got to follow certain procedure. When testimony is hearsay, it's not admissible, we all know that.

Mr. Taylor: Certainly, Your Honor. May I know this from you? A murder case is being tried, a police officer says, "John James said defendant Doe did it." I have defendant Doe's statement that say contrary-wise. Won't you concede that on cross I would ask him if, indeed, the statement doesn't say otherwise?

[1097]

The Court: No, let's get on with it.

Mr. Taylor: What about this business about the escape, and so forth?

The Court: I don't even want that mentioned.

Mr. Fleming: Judge, I understand that anymore inquiries in an effort to establish probable cause is not going to be made in front of the jury?

The Court: That's right. I mean, that's my ruling, whether it's going to be followed or not, I don't know, but that's the ruling.

Mr. Taylor: Well, can we get this straightened out? What is your situation in regard to your witness? I want to cooperate if you've got a man—

The Court: (interrupting) I take him—if you all are not finished, I'll take him off and put the other guy on, and then you can put him back.

Mr. Taylor: May I reserve any response to your ruling in reference to contempt and so forth, and may I again assure the Court that I have not fully understood from the Court to stay away from the escape thing. The Court's made it plain now to stay away from the escape.

[1098]

The Court: (Nodding head affirmatively.)

Mr. Taylor: Will the Court permit—O.K. Just stay away from the escape?

The Court: (Nodding head affirmatively.)

Mr. Taylor: The Court wants, furthermore, to stay away from probable cause, right, sir?

The Court: In front of the jury, right. If you've got something—I've been through it once and I've overruled it. If you've got something else that comes up, ask if we can take it up in Chambers.

Mr. Taylor: Yes, sir. May I ask you this question, Your Honor? Would Your Honor see that sometime the assertion of a witness, so-called witness, going into probable cause and going to further the Commonwealth's case, that there is an overlap there?

The Court: Could be, could be.

Mr. Taylor: All right, now, Judge Hayes, may I reserve any reactions to your other positions that occurred back here in Chambers?

The Court: All right.

Mr. Taylor: Thank you, Your Honor. Now, we're going to take him off and put—

The Court: (interrupting) We're

[1099]

going to take him off and put the F.B.I. agent on.

Mr. Schroering: Yes, Judge.

(End of proceedings in Chambers.)

* * * * * * *

[1354]

The Court: Do you want to play the record?

Mr. Taylor: Could we have total silence?

The Court: All right.

Mr. Taylor: May the record show that what we are offering to play now has been offered by the Commonwealth of Kentucky—may I continue, Your Honor—as being an exact tape transmission interview of the witness, David Keith White, in City Police Headquarters, before Officer Kenneth Newcomb at the time and prior to when his written statement was prepared and he signed it. The Commonwealth alleges—

Mr. Schroering: (interrupting) Objection, Your Honor. (No ruling.)

Mr. Taylor: The voices you will hear at the Commonwealth's own giving to us of the tape, are those of David Keith White and Detective Kenneth Newcomb.

The Court: All right.

(Whereupon, the cassette statement of David Keith White, Commonwealth Exhibit No. 38, was played for the Jury. During this time both Mr. Taylor and Mr. Fleming were writing on the blackboard.)

[1355]

The Court: First of all, Mr. Sheriff, please remove the blackboard from the courtroom.

Mr. Taylor: May I object?

The Court: You may proceed.

Mr. Taylor: May I object?

The Court: Note your objection, overruled. If you're going to argue the case, the time to do it is after the closing of the testimony.

Mr. Taylor: I'll certainly keep that in mind, Your Honor.

The Court: Mr. Taylor?

Mr. Taylor: Yes, Your Honor?

The Court: Let's go in Chambers.

Mr. McCall: Renew our Objection No. 1.

The Court: Overruled.

IN CHAMBERS

The Court: Court is now in Chambers, present are all the attorneys, Detective Boyer, Mr. Taylor and his two witnesses.

Mr. Taylor: May the record show that

[1356]

I requested the aforesaid two witnesses be with me earlier in the day when the Court overruled the motion for recess, based on the fact that the Court had previously said we

would recess at noon today. The Court at that time didn't permit said two parties to be with me. It is now approximately a quarter to four o'clock, us having resumed, appeared back for the trial, as ordered by the Court, in spite of the foregoing circumstances, which appear in the record.

The Court: The Court at this time is holding Mr. Taylor in contempt for the second time during this trial for smarting off to the Court in Open Court. That's all I've got to say.

Mr. Taylor: May the record—may I speak to the record, Your Honor?

The Court: Go ahead.

Mr. Taylor: May I say that this last incident, as I view it, apparently, just as through this whole trial, provoked some anger in the Court, apparently, because it is now very, very obvious that the Commonwealth's lodgepole witness, towit, David Keith White, is talking a tissue of lies, that it is clear to everyone, the Commonwealth cannot possibly, unless they have further than David Keith White, get any conviction against my client, Narvel Tinsley, for either of these crimes. I

[1357]

would suggest most respectfully, we are all capable of error, that this has apparently enraged everyone other than myself, or at least a goodly number of people, I believe the record—are we making a voice transmission here, also—yes, I'll stand on the voice transmission going on right now that I believe that I am at myself and being moderate and controlled and civil. It was my understanding from the Court, indeed, I respectfully moved the Court to bring the blackboard out that we just used and, indeed, myself and Judge Fleming both marked on it. The Court, I have respectfully requested the Court before, out of the hearing of the jury, if the Court would so consider to please do so to stop making waving gestures with the Court's right hand

in an effort to move me about the room as though I were a sheep, or something, which I am not a sheep. I cannot very well, under the circumstances, an intensive trial, the sixth day and into hours and hours beyond this case that the Court set it for, help perhaps but react somewhat if the Court should abuse me from the Bench.

Now, the Court has contempt power. The Court, however, I would respectfully suggest, is under the law, as we all are, and the Court, it seems to me just now—I'm looking for a clearer way to put it, because I'm so exhausted, but pulled the rug out from

[1358]

under me by permitting me on the one hand to bring a blackboard in and then, apparently evincing some rancor that we had, this is an opinion only, scored so many favorable points for my defendant by further exposing the falsehoods that Keith White is capable of and that are traceable to him. The Court then is, I suggest to Your Honor, working a detriment on the rights of my client, Judge, Narvel, by continuing to degrade me as a human being. The record—I say may the record again show that my only purpose at all in this matter is to try to defend this client. This is not the first murder case that I have ever had and I doubt that it shall be the last. I am not being paid for this, I am volunteering my services, after having been asked by the defendant on trial to do so. The Court, I would suggest, is taking unfair advantage of a lawyer when the Court itself is snide to the lawyer, because the Court has—there have been articles written on it, books written—the Court has power to punish at its discretion and perhaps, at least, has immediate power to punish at its whim or caprice. I say that, not personally, Your Honor, I'm trying to state the abstract proposition.

The Court: There is nothing personal about this whole thing, as far as the Court is concerned.

[1359]

Mr. Taylor: Well, Judge, I suggest most respectfully that that certainly was a cut at counsel when you said out there, as though I had done something wrong, the inference was, "Mr. Taylor, argue your case when the time comes." Well, your having instructed me to do so, I was telling the Court I would so so. Whereupon, I just wonder how much psychological pressure it is possible (a) for me to be put under, (b) for me to bear, (c) for my colleagues at the bar to stand and remain mute while it's happening.

Now, this isn't happening to me, per se, as an individual. We're in a Court of law on a case that can't get anymore serious. It's gotten on a plane that I don't want it to be on and I would honestly try again and even harder, but it's awfully hard to try when you can hardly hold your head up. Again, I put in the record that the Court had assured counsel prior to today that we would recess at noon and that this was not done and if there were a change on the Court's part, this was done ex parte as far as I am concerned, and no attache of the Court, or anything else, advised me of same and the first I heard about it was some, pardon the word, gossip about it this morning. I was not told officially or anything and that by then, I had so arranged my own work

[1360]

schedule that there was no way I could recover the night that had just gone before. I am suggesting to Your Honor that I'm trying the best I can to try this case. If Your Honor will tell me—are you looking for some specific thing that I can help you?

The Court: No, I'm going to put something in the record when you're through. Go right ahead.

Mr. Taylor: Well, I think—what did you want to put in the record?

The Court: This is the same thing Mr. Taylor is complaining about, about the Court changing its mind about

running on Saturday, is just like the case when Mr. Taylor filed this motion, motion to discharge prospective jury and asked for a hearing right after the close of the testimony for the day, we all came back here, everybody was here, but Mr. Taylor—

Mr. Taylor: (interrupting) Everybody—I didn't hear what you said, everybody was here with, or by?

The Court: I said everybody was here, but Mr. Taylor. It's just like every other day, as soon as the last witness says the last thing, Mr. Taylor is headed for the alley.

[1361]

Mr. Taylor: I'm trying to prepare my case.

The Court: As far as I am concerned, it's immaterial to the Court whether this man or that man is convicted or not convicted. That's not my purpose. I am here to see that both of them, and also the Commonwealth, get a fair trial. The way Mr. Taylor has conducted his case, he is the one who is preventing his client from getting a fair trial, and not the Court.

Mr. Taylor: May I speak to the record?

The Court: I haven't finished. It's a shame that the record cannot show his tone of voice, his motions around the courtroom, his antics. All the record has got from the very first day is what he has said, which is sufficient for me.

What I am doing, I think is right. I think if it gets to that, the record will speak for itself and bear me out.

Mr. Taylor: May I speak to the record, if Your Honor please?

The Court: Go right ahead.

[1362]

Mr. Taylor: There has not been a day in this trial that I haven't asked Your Honor if I was excused and Your Honor assented that I was, indeed, Your Honor has signed orders every night, on my proffering them, allowing me to confer with my client.

The Court: That is not true, as far as I am concerned, that he's asked me if he's excused every night. Mr. Taylor says it is to him, but it's not to me, I don't recall that.

Mr. Taylor: Well, I disagree.

The Court: I have signed his orders so he could see his client every night.

Mr. Taylor: Let me say another thing in the record. I've got an obligation as an officer of the Court and an officer of the Bar to try that case in there. When the case is over with for the day and the Court is adjourned, I will, indeed, split for the alley. I am not the slave of anybody and I'm amenable to law and I've got my rights. I do so to prepare my trial and my case and I would just like to state that position very fairly. As long as the Court will fairly and plainly express its wishes to me, my purpose is to respond thereto, within the law.

The Court says it's a shame that my

[1363]

tone of voice and antics are not carried on the record. I would say similarly that, in my opinion—now, we are out of the hearing of the jury—that the Court's overbearing contentiousness in regard to me, both by phrase and by its utterances and by the expression on its face and the waving of its arms grandly, causes me to think that it's the Court that is prejudicing the trial of this case. However—

The Court: (interrupting) Whatever I say to you goes through one ear and out the other, Mr. Taylor. I have told you and the record will bear me out, at least 15 or 20 times, not to do this, or to do this, or do that, and you just completely, completely disregard the Court's orders.

Mr. Taylor: May I know this from Your Honor? Did the Court tell me not to get that blackboard in when I asked the Court?

The Court: I did not tell you not to bring it in.

Mr. Taylor: All right, sir.

The Court: I told the bailiff to take it out, after you get it up here and you put something on it and you underlined it three or four times.

[1364]

Mr. Taylor: Does Your Honor understand that my purpose is to defend my case?

The Court: I think that's probably what you're here for, I'm not sure.

Mr. Taylor: May I—I am sure, though and I'm as sure as anybody. Let me say that I differ greatly with Your Honor that I'm prejudicing the defense of my client, Tinsley, and I think at this time that I'm going to move Your Honor to bring my client in and go on the record so that I may protect myself.

The Court: Overruled.

Mr. Taylor: I want to make very plain that this in Chambers conference does not include my defendant as being present and I'm moving Your Honor right now that you inquire of my client and that you spread on the record of this case his reaction and determination and opinion and judgment and position as to whether or not he objects to the way I am conducting his defense.

Now, I think, Your Honor, in fairness, when you put into the record of the case something like you just have where you, using brute power of your office, saying to me that I am damaging my client, that I would appreciate Your Honor giving me—

The Court: (interposing) That's my opinion.

[1365]

Mr. Taylor: —opportunity to respond to it and I think, in fairness, that the record should show what my client thinks on the proposition and I'm requesting that you might permit that to happen.

The Court: Put it in there, I don't care. I'm not interested in what he thinks about how you are conducting the

trial. The Court is interested in a trial that's conducted properly—

Mr. Taylor: (interposing) And so am I.

The Court: —and proper respect is shown to the Court which you, for some reason, can't learn.

Mr. Taylor: Your Honor, I'm going to respond to that most respectfully by saying that I consider that I am conducting this trial as allowable under law. That's what I live under and I'm not trying to get into any personality flaps with anybody. I request again that my client, Narvel Tinsley, be allowed to speak to the record as to whether or not he has any complaints at all about the way I am conducting his defense and I request this as a matter of due process because you are impinging my professionalism.

[1366]

The Court: Get the Sheriff and bring him in here.

Mr. Fleming: While we're waiting for him, could I renew my motion to set aside the swearing of the jury and sever the trial of the case of William Michael Tinsley on the ground that the situation that exists between defense counsel and the Court has an adverse effect upon the trial of his case.

Mr. Schroering: Commonwealth would like to respond to that. If the Court has obviously been conducting itself in the highest decorum during the proceedings. Anytime there have been statements between Mr. Taylor and the Judge, it has been out of the hearing of the jury and back here in Chambers and under no circumstances have there been any indication in open Court of any dispute, argument, or otherwise between defense counsel, Mr. Taylor, and the Judge, and I might say that the Judge has in every way acted with decorum in this case.

Mr. McCall: On behalf of William Michael Tinsley, we submit the same thing and we feel as though Mr. Talyor's what we have previously described as side comments, et

cetera, have prejudiced not only his own client's right to a fair trial, but our client.

Mr. Taylor: May I respond to the record?

[1367]

Mr. Schroering: I think Mr. Taylor is trying the case as he probably—

The Court: (interposing) Show I've left the room.

Mr. Schroering: —in the best interest of his client, and the Commonwealth is not in a position to judge. We want to go by the rules.

(Whereupon, the Court returned to Chambers and the defendant, Narvel Tinsley, was brought into the Judge's Chambers, accompanied by a Deputy Sheriff.)

Mr. Taylor: Your Honor, may I proceed, please?

The Court: All right.

Mr. Taylor: Thank you, Your Honor. Your Honor, before Your Honor left the room for a minute we were waiting for Your Honor to come back and the Court has now come back and we appreciate it. I was going to say two things relative to the last thing you just said. I was going to say, Your Honor, that it's been talked about side comments—I've been getting just as many and they're said in such a way that you can't hear them and Mr. Ousley being the worst—

The Court: (interrupting) I agree with that.

[1368]

Mr. Taylor: In fairness—you say, "I agree with that," it's kind of the hen or the eggs, or however that thing goes, honestly, I believe if you want to tally up side comments. Now, another thing, I've got no—I want to finish this case without any rancor with my brother lawyers here and so forth, and I know they're doing the best they can for their client, Judge.

The Court: You want this lady back in here?

Mr. Taylor: Sir?

The Court: You want the girl back in here?

Mr. Taylor: She's taking a little walk. She's all right. I thank you very much. The record will show that Mr. Baxter Shilling is here and I appreciate your offering to wait, Your Honor. I believe she'll be all right. She's not been in the legal business very long.

What I was saying to Your Honor is that it's—oh, yes—it's easy and maybe a defense and I'm not attributing it to anything improper, I say maybe it's a defense mechanism for William Michael to say that ole Dan Taylor, but Judge, this last bit with the blackboard, in the first place, I have gotten it into the record over and over that we thought we were going to

[1369]

stop at noon and I'm just about past my endurance. I'm going to try, Your Honor, with every drop of blood to follow the Court's orders and so forth, but it's almost like a torture chamber at this point, Your Honor, with all of this flak—I don't mean from the Bench with that word, Judge—I mean down there on the floor and the way people are sitting and the different juxtaposition from the different lawyers and so forth and so on. What I would request to know, I've asked the Court's permission to bring my client in and he's out of hearing of the jury and here in Chambers and I would request that Your Honor might swear him to tell the truth and that his testimony be restricted only to whether or not he wants me to continue as his lawyer and that he not be asked in anyway about anything having to do with the case. May I do that, Judge?

The Court: Just let him go ahead and—

Mr. Taylor: (interrupting) Would you swear him?

The Court: You want me to swear him?

Mr. Taylor: If you would, please.

[1370]

NARVEL TINSLEY, called as a witness by the defendant, Narvel Tinsley, having been first duly sworn, was examined and testified as follows:

Mr. Taylor: Did Your Honor want to conduct it?

The Court: No, go ahead.

Direct Examination

By Mr. Taylor:

Q. You're Narvel Tinsley, is this right?

A. Right.

Q. You're on trial right now for the murder of two policemen, aren't you?

A. Right.

Q. You know me, Dan Taylor?

A. Yes, sir.

Q. What am I to you?

A. My lawyer.

Q. All right, if—you have been here with us for the last six days?

A. I'm not quite sure how long, but I know I have been here.

Q. Now, during the time of trial, Mr. Tinsley, as much as I was able to, have I on nights come

[1371]

over and conferred with you at the jail?

A. Yes, sir.

Q. And worked with you toward preparing your defense?

A. Yes, sir.

Q. Have I explained to you, sir, the different elements I thought were important in making your defense?

A. Yes, sir.

Q. Do you feel that I have been fair to you?

A. Yes, sir.

Q. Have you paid me any money?

A. No, sir.

Q. You had called for me earlier, before I first saw you to defend you, isn't that right, sir?

A. Yes, sir.

Q. Are you dissatisfied in anyway with my defense?

A. No, sir.

Q. Do you want me to stop defending you?

A. No, sir.

Q. Do you want to ask the Court for another lawyer?

[1372]

A. No, sir.

Q. Do you want to ask the Court for any member of the Louisville Bar Association to even assist me?

A. Nobody, but whoever you need, if you need him.

Q. Do you have that kind of confidence in me?

A. Yes, sir.

Q. Are you willing to leave your life in my hands now?

A. Yes, sir.

Mr. Taylor: Mr. Schroering may care to ask.

Mr. Schroering: I'd just like to ask a few questions relative to this question about lawyers.

Cross-examination

By Mr. Schroering:

Q. Originally, the Court appointed a lawyer for you, Mr. Warner. Do you recall Mr. Warner?

A. Yes, sir.

[1373]

Q. Did you talk to Mr. Warner about the case?

A. I talked to him about it.

Q. Did he have certain doctors to come in to examine you, or did he talk to you about having doctors to examine you?

A. I wouldn't want to say, because I'm not sure. I'm quite sure he did, but I couldn't swear to it because I don't exactly remember.

Q. How many times did Mr. Warner talk to you about the case?

A. I didn't even get to see him that regular, but he come over maybe—not to be exact, maybe four times.

Q. He came over to the jail to see you, is that right?

A. Right.

Q. Now, did anybody else come over to the jail and talk to you about the case while Mr. Warner was your lawyer?

A. Uh-huh.

Q. Who was it that came over to talk to you during that time?

A. Some young guy came, but I don't know

[1374]

his name and I'm quite sure he had somebody else with him, sometimes, but I don't exactly remember what they was, but I remember something about doctors and I think they did bring some doctors in there.

Q. Was this from the Legal Aid Society, or do you recall?

A. I can't remember.

Q. Now, do you want to tell the Court how Mr. Taylor first came over to see you?

A. I remember I had tried to write letters. I wrote letters and they came back. I had call-out cards and the man tore them up. I sent my people on the street to go to try to get him for me. I tried and finally I wrote a letter.

Q. It was your specific request that you wanted Mr. Taylor to represent you, is that correct?

A. Yes.

Q. Did any other lawyer see you besides Mr. Warner and Mr. Taylor, and talk to you?

A. About the case?

Q. Yes?

A. I don't think so.

Mr. Taylor: Your Honor, I hate to interrupt Mr. Schroering, but has this got anything to do .

[1375]

with whether he wants me to continue representing him?

Mr. Fleming: Let's get back, it's 5 after 4.

Mr. Taylor: I think we ought to adjourn until Monday to get ourselves together. I really do. We've got 55 minutes—

The Court: I have one question I'd like to ask Mr. Tinsley.

Mr. Taylor: (To Narvel Tinsley) Please respond to his questions.

The Court: Has Mr. Taylor represented you before, sir?

Mr. Tinsley: No, sir, only this time.

The Court: How did you know about his name, or how did you know about Mr. Taylor?

Mr. Tinsley: One of my used to be girl friends that I had children by—well, I talked to my sister and everybody and the teacher and stuff and they told me he was a good lawyer and I tried to think of his name at first, but I couldn't think of it. I asked Mr. Warner about him. All I knew was I told him his last name started with a T and he'd been on a lot of cases, but I couldn't think of his name. He said he couldn't think of it.

[1376]

Mr. Fleming: Let's finish up with this witness today.

The Court: We'll finish up with this guy and quit. O.K.?

Mr. Taylor: O.K.

(End of proceedings in Chambers.)

* * * * * * *

[1798]

Mr. Taylor: Your Honor, would you indulge counsel?

629. Which officer did he give it to?

Mr. Taylor: I wonder if you could stop him for just a minute.

The Court: Are you making an objection?

Mr. Schroering: Is there an objection?

Mr. Taylor: Uh-huh. I'm making a motion.

Mr. Schroering: Out of order, Judge.

Mr. Taylor: Well, you haven't heard what it is yet. It might be very much in order.

(Conference at at Bench between Mr. Taylor and the Court, out of hearing of jury and reporter.)

Mr. Taylor: I'm requesting an in-place recess for about 15 seconds with my fellow lawyers on this point, if I might, sir.

The Court: Mr. Taylor, sit in a chair, please, sir. Go ahead and proceed, Mr. Schroering.

Mr. Taylor: Your Honor—

[1799]

630. (interrupting) I believe that you have testified, have you not—

Mr. Taylor: (interrupting) I'm moving the Court for a—

The Court: (interrupting) I'm overruling you, sir.

Mr. Taylor: I'm asking to go on the record.

The Court: I'm overruling you, Mr. Taylor.

Mr. Taylor: I am asking—I am moving the Court to go on the record with my objection.

The Court: Let's go on the record in Chambers.

Take the jury to the jury room, with the same admonition.

IN CHAMBERS

The Court: It's the order of the Court again that Mr. Taylor is in contempt of Court. Also, I want to say something to everybody.

[1800]

I can stay here—I'm going to be here four years. I can

try this case for the next four years, if you all want to drag it out, want to ask the same questions over and over. It doesn't make a bit of difference to me, if that's what you all want to do. It doesn't make a bit of difference to me. I'm saying his not only to Mr. Taylor, but to Mr. Schroering, Mr. McCall and Mr. Fleming. Mr. Scott hasn't asked a question. So, I think a lot of this we are just rehashing the same old stuff over and over. I realize that you—that the Commonwealth, and one reason I haven't sat on you as much as I probably should, is that the Commonwealth has the duty to make their case and they can't rely on Mr. Fleming making it or Mr. Taylor making it for them. Therefore, I kind of let you rehash a lot of this. That's the point I'm mentioning about let's get on with it. As far as Mr. Taylor is concerned—I won't say anymore. The record speaks for itself.

Mr. Taylor: May I request to speak to the record?

The Court: Go right ahead.

[1801]

Mr. Taylor: Thank you, Your Honor.

If it please the Court, I would like to clarify my position of the last five minutes. Now, Mr. Schroering has been questioning the witness about the colloquy between the defendant on trial, my client, and the police officers. I requested—I was going to attempt to talk to counsel for William Michael Tinsley very briefly, I asked you for 15 seconds to cover a distance of maybe 6 yards, not very far, to advise them that in my humble judgment, we wanted to move Your Honor to admonish, as this point, as to the reciprocal rights between the parties in an arrest situation like that. Now, Your Honor might feel that this would be cured by, say an instruction on the right to arrest. I think it is incontestable, Judge Hayes, nobody claims—the Commonwealth doesn't, and there's been no proof at all that these police officers found the commission of a felony taking

place right then, that they had strong suspicion, or whatever that arrest statute requires, that there had been a felony, and/or further, Your Honor, they were exercising a valid arrest warrant, or, Your Honor, I left out one, that there was a misdemeanor being conducted, or done, in their presence, or that they were in furtherance of a search warrant. Now, I submit to Your Honor that that being the case, from the

[1802]

standpoint of law, leaving aside the sociology for a minute, and leaving aside, if you please, Your Honor, the different personalities which are apparently lying one against the other, somewhat abrasively in this case, that as a matter of law, Your Honor, if you will accept as being true those five propositions I just stated, that the colloquy and the relationship, vis-a-vis, I might say, Narvel Tinsley and the offending—ah, so—the offending police officer, that they could as well have been totally insulated. In legal theory there was no right in the officer to be conducting himself as he was then doing. Now, this being the case, Judge, just as when you move into another area, if I'm going to adequately represent my client, I wanted you, if you felt I was correct in the law, to see that this was the time, just as you instructed on two occasions already that this business—on three, No. 1, Your Honor, was relative to having previous convictions for felony, which Mr. Schroering stood right there and flouted every rule that we know about asking that question, unless this is the first case he's tried. I know he's tried more than that, but you instructed then. Secondly, Your Honor, it came up about the pistol, was it stolen, and so forth. You put the quietus on that and I think correctly. The third thing went through my mind,

[1803]

maybe it's bootlegging, but at any rate, you have shown us this afternoon that when a request is timely, when we have timely requested, that if our objection was properly

made you would admonish the jury that what the background law was applicable to that then point. Now, here's how we got into trouble, if you will permit me to make a suggestion. Obviously, Mr. Schoering was about to get the damage done and it was a question of a leak in the dike, or worse, and so forth, but he persisted in taking advantage, or trying to, and doing things, and one of his devices—Mr. Schroering, we're out of hearing of the jury and in Chambers—I have observed, is to continue to—I want to use a mild phrase—to continue with his talking and his questioning and his interrogating of a witness, while Your Honor still has a motion up. Now, Judge, I would be less than flesh and bood to sit there. I would suggest, with all due respect to my brothers, Scott, Fleming and McCall, that here might be a tiny bit of merit in my intellectual position in this regard, there might not, but let's say all I wanted to do was resolve that. I wantd to request of them their support in getting an admonition from Your Honor, or an instruction from the Bench to the now jury as to the reciprocal rights existing between the interrogating and harassing policemen and the non-offending American citizen that was getting pushed

[1804]

around then. Now, possibly Your Honor would have said, "You're wrong, Mr. Taylor," but that's really not how we got back here in this room. I then asked you for an in-place recess for 15 seconds, Schroering—Mr. Schroering—I first asked you if you would just keep him quiet, I think, I may have put it somewhat indelicately, long enough for me to discuss with the three other lawyers, none of which had a flicker of recognition on their faces, which is their business, and I'm trying to get over there and talk to them and Mr. Schroering continues, just like a bull in a china shop, to go like a juggernaut to plow right on through. Now, if this is fair, it escapes me how it could be. Then, he continues to open this wound which I see coming and I'm asking you

to let me come to the Bench and tell you what and you say no and the next thing you know, I'm back here.

The Court: That's the reason. The reason you're back here, Mr. Taylor, is not that I'm saying I'm correct in my ruling, or I'm incorrect, but I am saying this, when I make a ruling, that's it. When I tell you to sit down, I mean to sit down. When I say overruled, I mean overruled. When you ask me for a conference or a recess, or to go on the record

[1805]

and I say overruled, that's exactly what I mean. I don't want to hear another word.

Mr. Taylor: May I point this out to you, and I may be in error, but I don't believe I am, I got dual instructions, as I understood it from the Court. I heard the Court say on the one time, "Yes, go and confer," and then—now, maybe the Court didn't understand that I was asking you that I might confer, and with him waiting long enough to see if we wanted to then make a motion. Then, you said and someone, I don't know who, it was either the Bench, or Mr. Schroering said, "We'll just continue on." Well, to do that completely emasculates the position that I'm driving at. I've got to defend my client. I do not intend to let Mr. Schroering run over me and convict my client on the basis thereof. Now, if Your Honor will just please reflect, or the record will show, possibly I misunderstood, but I don't believe I did. It was my understanding you had given me permission—I wasn't asking to go out of the place, I wasn't asking for a cigarette drag, or I wasn't asking for one of ours to go out of the room, or something, I was merely—is it asking too much, the 7th day of trial, the prime case in town, worst one I've even seen, three days to get the jury, go through three panels to get them, costing all of us a

[1806]

great, great energy, and so forth, not getting paid at all,

trying to do the right thing, is it asking too much to ask 15 seconds with three other lawyers and when Your Honor sustains me and Mr. Schroering continues to talk, to ask Your Honor if he won't enforce the first order that you gave to me. Now, that's my position.

The Court: I think you probably misunderstood me.

Mr. Taylor: Well, maybe I did.

The Court: I think the record will show that it was the Court that told Mr. Schroering to continue.

Mr. Taylor: May I know this, please, with all due respect to Your Honor, if I ask you, sir, for an in-place recess, wouldn't that contemplate that Mr. Schroering would at least stop talking?

The Court: I think it's up to me.

Mr. Taylor: Do you mean, sir—

The Court: (interrupting) If you want to go over and talk to these gentlemen, it's all right with me, but I'm not going to stop the trial every so often.

Mr. Taylor: With all due respect, Your Honor, I was under the impression that heretofore the

[1807]

Court didn't greatly object, as long as I maintained protocol and didn't offend in anyway, if I went over and talked to them at any time. What I was requesting of you was to—what is it they say in television instant reply—was to stop the action long enough for me to discuss this point with these lawyers. I might add that I am still requesting you about 30 seconds with them, if I could have it?

The Court: You can have it.

Mr. Fleming: We don't need 30 seconds to talk about that, because, as far as I'm concerned, the law of the case comes at the end of the case.

Mr. Taylor: All right, it doesn't break my heart that you don't want to talk.

Mr. Fleming: If that's what you want to talk about, why that's—

The Court: (interrupting) I've made the ruling.

Mr. Taylor: Are you saying that you don't want to step outside to discuss things with me, if I suggest that it might be well?

Mr. Fleming: I'll discuss it with you, but I don't want to take up the time, if that's what it's about.

[1808]

Mr. Taylor: Well, you know, I just don't think—

The Court: (interrupting) When you get through, come on back in.

Mr. Taylor: Yes, sir.

(Whereupon, defense counsel went out into the hallway and conferred.)

Mr. Taylor: Your Honor, I want to make a motion to Your Honor that I want to request you to instruct the jury from the Bench now that there's been no evidence that the police officer was conducting a lawful arrest and that this being the case, the responses of Narvel Tinsley can certainly—should be viewed in that light.

The Court: The Court is overruling that.

Mr. Taylor: While we're in Chambers, can I ask you another thing—

The Court: (interposing) Yes.

Mr. Taylor: —in the form of a motion. I will move the Court, of course, to have the jury view the scene. This could probably most effectively be done at dark. What is your feeling on that, Your Honor?

[1809]

The Court: I don't know, offhand.

Mr. Taylor: Let me tell you why I think it's important. Narvel Tinsley is right. I've been to the scene many times now, half a dozen, under different circumstances, and, for what it's worth, my judgment is that the chart does not adequately represent the situation, in relationship—you might say, how can you mess up if you put distances down.

I don't know whether it's a matter of perspective, or anything, but it would be a great, great help in this whole case if this jury could just see that alley—

The Court: interrupting) If they ask for it, then I'll have to consider it.

Mr. Taylor: Well, Judge, Your Honor, I know—

The Court: (interrupting) Provided the area hasn't been changed.

Mr. Taylor: No, it's about the same. Judge, they're not going to ask for it, plus, we're close to that case that went up, the case where the jury was already in—

Mr. McCall: (interrupting) The Moore case?

Mr. Taylor: Yeah. Do I have the

[1810]

facts right, that they were in?

Mr. McCall: Yes, they were in deliberations. We don't want to do that.

The Court: No, I wouldn't do that.

Mr. Taylor: O.K. Now, I consider, without holding myself out to be the Court of Appeals, I consider that that's a pretty serious error.

The Court: It could be.

Mr. Taylor: Yes, sir.

The Court: If they do it, we'll do it before closing argument.

Mr. Taylor: Judge, they're not going to say scat.

Mr. McCall: Mr. Mikkelson might ask. Our hope is in Mikkelson, if anybody's going to do it.

Mr. Taylor: You're surely not saying the only way you'll sustain the motion is if the jury—

The Court: (interrupting) I'll consider it before we finish.

Mr. McCall: Judge, may we just make one brief observation on the record. We move the Court to instruct both —all lawyers involved here, that objections are to be made with, "I object" and the reasons why, and no colloquy be-

tween Mr. Schroering and Mr. Taylor, and constant movements around, and both of them up there

[1811]

together questioning the witness. It disturbs—

The Court: (interrupting) I'll not only make an instruction to that, I'll make an order to that effect.

Mr. Taylor: May I know—I want to know what the order is, exactly.

The Court: That if you have an objection—

Mr. Taylor: (interposing) Yes, sir.

The Court: —and while we're out of the hearing of the jury, I want every counsel to remain seated until he's asking the questions, or until a witness is pointing something out on the blackboard that everybody wants to see. Every counsel get a seat and remain seated. If something comes up and you want to make an objection, holler it out, "I object." Then I want the guy that's asking the questions to stop—

Mr. Taylor: (interposing) Stop. That's fair enough.

The Court: —until I can decide the objection. I want no arguing the objection in front of the jury, no side quips between any of the attorneys, anything of that nature.

[1812]

Mr. McCall: Then if you say approach the Bench on any objection, then we can come up and argue it.

The Court: That's right.

Mr. Schroering: And if the Court rules in a particular case—

The Court: (interposing) That's it.

Mr. Schroering: —that's it, and no constant asking the Court to change its mind.

The Court: Right or wrong, that's it.

Mr. Taylor: May we—well, I won't say it will be off the record, because I understand Mr. Schroering doesn't want anything off the record, but occasionally a situation —if there were a tiger, a Bengal tiger behind you, about

to attack you, and I say, "Your Honor, move your head," and you say, "Sit down, Mr. Taylor," I would probably go against—if there were a Bengel tiger—against what you told me directly, and try to deflect the tiger, or lure him, or warn you. Sometimes, circumstances alter things.

Now, I'm suggesting to you—I don't have a tiger.

The Court: Hold that tiger.

Mr. Scott: If you've got a tiger,

[1813]

you're really in trouble.

Mr. Schroering: Judge, do I take it that Your Honor is ruling that when you make your ruling from the Bench, that counsel are not supposed to go to the Bench and continue to argue it?

The Court: That's right.

Mr. Scott: Judge, may be put in the record a motion to sever and the same continuing objection made on the ground of what has occurred in the past and the recent outbursts?

The Court: Let's take about a 5 minute break.

(Whereupon, there was a short recess, after which the following proceedings were had in Chambers.)

Mr. Schroering: The Commonwealth requests the Court not to have any hearings off the record. Mr. Taylor is constantly going to the Bench before and after questions are asked, carrying on conversations with the Court.

The Court: I'll do that, but I think one of you all should approach the Bench.

Mr. Rosenbaum: Mr. Taylor approaches

[1814]

the Bench, and says, "I'll be off the record." I think everything ought to go in the record, unless there is an agreement to the contrary.

The Court: All right.

Mr. Schroering: And the reason why the Commonwealth changes the manner in which it usually tries a case with

Mr. Taylor is for the reason that everytime the Commonwealth approaches the Bench and gets within arm's distance of Mr. Taylor, he does not know how to conduct himself like an attorney and a member of the Bar. This is my feeling in this case and from the beginning, it's a poor commentary of our Bar Association. Let's take about 5 minutes and cool off.

* * * * * * *

[1895]

Mr. Taylor: Well, say something, please. Now, how about that bus? When do you want to move the jury out?

The Court: I don't know.

Mr. Taylor: Now, another problem, Your Honor. There are people out in that hall trying to get in this courtroom and empty seats, and my client is not getting a public trial.

The Court: There's plenty of public out there. If you want to put that in the record do so, but you're overruled.

Mr. Taylor: May I—

The Court: (interrupting) The courtroom's full enough. If I've got two people out there, that's a public trial, as far as I am concerned.

Mr. Taylor: I object very vehemently to what His Honor is ruling in that regard.

Mr. Schroering: At this time, the Commonwealth tenders the statements which it has in its possession, given to them by the defendant, Hampton Thomas, and, in order to show the nature of this testimony and also show that he has no evidence that would be in anyway helpful to the defendant, Narvel Tinsley, I'll give them to him now.

[1896]

(End of proceedings in Chambers.)

IN OPEN COURT

(At Bench, out of hearing of jury.)

The Court: Miss Virginia, let the record indicate the defendant, Hampton Thomas, who is under indictment,

being called by the defendants in this case, on advice of his attorney, has taken the Fifth Amendment right not to testify. This has been sustained by the Court, over the objection of defendants.

(End of proceedings at Bench.)

* * * * * * * *

[1905]

Mr. Taylor: Your Honor, I call Bob Winlock, that gentleman sitting right there, under subpoena.

The Court: Mr. Winlock?

Mr. Taylor: And I'll waive the fact that he's been in the courtroom all this time.

BOB WINLOCK, called as a witness by the defendant, Narvel Tinsley, having been first duly sworn, was examined and testified as follows:

The Court: Can I see the witness and all the lawyers in Chambers?

You may go back to your room, ladies and gentlemen, with the same admonition.

IN CHAMBERS

The Court: We're in Chambers again with Mr. Winlock, who's been called as a witness for the defendant, Narvel Tinsley. Mr. Winlock, you've been in the courtroom all the time. What's

[1906]

the nature of this testimony, or what's this for?

Mr. Taylor: Is the Court inquiring of counsel for Narvel Tinsley?

The Court: Yes.

Mr. Taylor: Your Honor, the question will be posited to Mr. Winlock as to whether or not during the investigation of this alleged crime he, indeed, or his minions were not down at the actual scene of the investigation with their

television cameras grinding right away, their lights photographing evidence being gathered. Now, the relevancy is, of course, the over-all theory of defense here, that my client, of course, being innocent, he's being framed by, or that a clumsy attempt is being made to do so, by the agencies in this city, including the media and including certain arms of the legal apparatus. I have alluded to this in my opening statement. To not permit me to do it would be patently unfair. That's all I want to know. I'm not going to ask Mr. Winlock—although I understand, may the record show quite tersely, had previous occasion to marvel at Mr. Winlock's news gathering ability, he apparently being privy, it seems to me, to internal workings of the Police Department on occasion, but I don't intend to get into that. Let's say this is a free country and that's his business. I want to ask one or two simple questions in that area that I have

[1907]

indicated.

Mr. Winock: I wouldn't object to telling him how I happened to be there.

The Court: Pardon?

Mr. Winlock: I wouldn't object to telling him how I happened to be there.

Mr. Taylor: Even the suave Mr. Winlock has no objection.

The Court: What do you know about the case, know? That's what I'm interested in is the merit of the case.

Mr. Taylor: Your Honor, I object to your asking him, if I might, respectfully, inquiring of him in that regard, because he's got his sources and he may know something helpful to the Commonwealth.

The Court: He doesn't have to divulge his sources.

Mr. Taylor: If you please, Your Honor, you've asked him what does he know. If the Court is going on its own motion inquiring into that area, all I want to know from

this newsman, who is so well acquainted with the citizenry of Louisvile, you can hardly turn on the set, but you don't see his face, I just want to know if he, or some of his underlings were down there in this ghetto area where the deprived blacks live, taking pictures of the

[1908]

evidence gathering for the edification of the population of Louisville.

The Court: I can't for the life of me see that that has a thing to do with the case.

Mr. Taylor: Well, it has this to do with it, Judge.

The Court: I'll tell you right now, we're not going to get into any situation, as is often the case, where this is black against white, racism. There has been no question of that brought out in this trial whatsoever.

Mr. Taylor: What's going to prevent us from getting into that situation?

The Court: Because it hasn't got anything to do with it.

Mr. Taylor: Your Honor, I suggest that that—most respectfully—that that's for the triers of the fact to determine in this case.

The Court: Well, it's for the Court to determine whether you can even start it, and I'm saying right now that I'm making a ruling that that will not be brought out in this case and this witness will not testify.

[1909]

Mr. Taylor: Judge, you're acting, I would suggest most respectfully, on the basis of rancor. You can't take the position that race is not an element political case. This is, of course, a political case.

The Court: There is no evidence even that this is a political case. That's what you guys try to make every case that comes into Court.

Mr. Taylor: Who are you referring to?

The Court: I'm talking about you.

Mr. Taylor: And who are the guys?

The Court: I'll change that to Mr. Taylor.

Mr. Taylor: I try to make every case a political case?

The Court: Yes, sir.

Mr. Taylor: I see.

The Court: And I will not let this man testify.

Mr. Taylor: Judge, you're hampering my defense—

The Court: (interrupting) What I'm going to do now, Mr. Taylor, is make you submit to me a list of your entire witnesses now.

Mr. Taylor: Adjourn until 2:00 and

[1910]

we'll prepare it.

The Court: I will not adjourn until 2:00. I'll give you 15 minutes. If you don't already know who your witnesses are—

Mr. Taylor: I know who they are, I don't go about with typewriters on my Hickey Freeman. (Throwing open his suit coat) Kuppenheimer, correct the record.

The Court: Write it on a piece of legal pad and I want it in 15 minutes.

Mr. Taylor: Your Honor, I want to take strong exception to your, and I mean this respectfully, only to express feeling, pulling the rug out from under the defense of Narvel Tinsley in this regard. What do you think that jury is going to think when Mr. Winlock, and this is only a figure of speech, slinks back out there and takes his seat on the front row and doesn't testify?

The Court: There's no reason whatsoever for you to say what you're saying against Mr. Winlock. You have a tendency of doing that to every witness, even your own witness you just called. You tried to browbeat her.

Mr. Taylor: Well, she said she didn't know, Judge, whether or not General Hospital treats bullet wounds in sewerage tunnels and even I know that. I know of

[1911]

no case, and I've had a lot of gunshot cases—you know, she's evading the question and this entire trial, I suggest to your client, my client, I feel, is not getting his legal rights. Now, my job—

The Court: (interrupting) What I'm saying again is you have no cause to say what you—

Mr. Taylor: (interposing) Your Honor—

The Court: —This man is not on trial.

Mr. Taylor: Your Honor, this man contributed another one of the straws trying to break the camel's back here. This man, in my humble opinion, in the interest of his already staggering reputation for news gathering, was out there before any other media photographing evidence being gathered before a warrant had even been issued for dissemination over channel 32, W, something or other,—I know it's near my house, I use another route to get there—so that everyone in the community could be saturated and brainwashed with a prejudicial preconception that these two Tinsleys were guilty. I know of no other case that this has ever happened in and if I am either stupid enough or meek enough to not raise the objection, I shouldn't have that shingle hanging out.

The Court: Sure, you have the right

[1912]

and you have made the objection and we've gone through this—

Mr. Taylor: (interrupting) And you're going to—you're now going to—you didn't have the Commonwealth produce ahead of time a listing of every witness I (sic) intend to call.

The Court: That's true.

Mr. Taylor: And you have, I respectfully say, continually ruled in this case favorable to the Commonwealth in identical situations and non-favorably to Narvel Tinsley.

Now, I have spent six weeks getting this defense together and I suggest to Your Honor that I should not have to reveal in a case of this nature to either the trial Judge and, especially since there are antagonistic defenses, ahead of time a list of who I'm going to provide.

The Court: Well, since the Court knows that you have subpoenaed newspapermen and so forth, I'm going to still direct you to—

Mr. Taylor: (interrupting) Judge, you're emasculating my defense by doing so. You're not allowing me to present a proper defense for Narvel Tinsley.

Mr. Schroering: Judge, may the Commonwealth say this, that had Mr. Taylor produced this

[1913]

witness on the question of whether or not there was any pretrial pubilicty, which hearing has already been had in this case, there would be no question about its relevancy, but I don't see, in view of the fact that this motion has already been ruled on, we've already had exhaustive evidence, the Court has already ruled, there's really no relevancy at the present time. Beyond that, Judge, as I see it, this particular witness has nothing, no relevant testimony to add at this time.

Mr. Taylor: Let me respond to that. If you're going to rule everytime that I'm about to get another point against Mr. Schroering, which we have quite a few, I'm persuaded to this point, if you're going to rule no, if you're going to stop me everytime that I start to put on any witness, it boggles the mind to think that of the 25 I contemplate, that I'm not right on one or two. This is not the kind of case where the advantage is in the defendant. You've got the Police Department, in my humble judgment, intimidating witnesses, you've got the whole media working, you've got a panel walking in here, 28 people which is already in the record, I've never seen before in my almost 20 years of experience, all with no conscientious scruples. Also—

The Court: (interrupting) Are you by

[1914]

that inferring the Court has rigged this jury?

Mr. Taylor: I didn't say the Court has rigged the jury. I will say this—

The Court: (interrupting) Are you saying the jury is rigged?

Mr. Taylor: Yes. I filed such a motion.

The Court: You're going to get a chance to prove that, Mr. Taylor.

Mr. Taylor: Would you care to tell me how in the world I'm going to prove what Mr. Schroering does, or whoever is responsible for that? You give me a chance—

The Court: (interrupting) I impaneled this jury. If it's rigged, I did it.

Mr. Taylor: I didn't say that the Court rigged the jury. Now, may the record be very plain on that. What I'm saying is that it is beyond mere coincidence that out of the hundreds of cases that I've tried to see 28 people march in there and none of them with conscientious scruples, and I'll say further to Your Honor, as I said to the Court, that an independent third party told me this is the practice and did not have the—whatever it takes to come forward and tell you—and the

[1915]

Court gave me the opportunity to go out and talk to him. Now, I cannot be proof for the other fellow's character. Now, I'm saying—that's another threat, I feel, and if the Court feels that I'm under some onus to prove that, I'm going to request the Court's help then in getting the past records, I'm going to bring in statisticians and we will have a hearing on it, but this behind the back—strike that. Strike the behind the back, please. I didn't mean to say it. I suggest that if the Court has any hearings or any proceedings in mind, that it fairly notice all parties in regard to same, and I mean fairly notice all parties.

Now, that motion is before Your Honor, the one in regard to the jury, and so forth. I have got problems enough trying to defend my client in these circumstances. How can you, on the one hand, sit there and let me take an opening statement, where you know full well what I'm driving at here, how can you on the same hand know, as I'm telling you directly, respectfully, Your Honor—

Mr. Schroering: (interrupting) Your Honor, I hate to interrupt—

Mr. Taylor: (interrupting) Well, don't interrupt then, Judge.

[1916]

Mr. Schroering: May the witness be excused?

Mr. Taylor: I haven't been able to finish a motion yet without Mr. Schroering interrupting me.

The Court: I told the witness that he will not testify. You can leave if you want to.

Mr. Scott: Could we suggest that Mr. Winlock be instructed not to repeat what's gone on in Chambers here, because I feel it would be detrimental to both—

The Court: I've told him that already.

Mr. Winlock: He told me that already.

Mr. Fleming: His appearance here is the result of his being subpoenaed in here by Mr. Taylor—

Mr. Taylor: (interrupting) It's incredible. It's incredible. I'm going to move Your Honor—

The Court: (interrupting) Don't discuss it with anybody.

Mr. Taylor: I'm going to move Your Honor again—pardon me, Mr. Winlock, did you want to say something?

Mr. Winlock: I was just telling the Judge after I think about all the circumstances, I don't

[1917]

know how I'm going to look now by not testifying, but whatever your ruling—

The Court: (interrupting) No, I'm not going to put you on. I'm not going to let Mr. Taylor put you on.

Mr. Taylor: Your Honor, may I take strong exception to that. Now, let's get in, if we might, please, into this other matter. I would request time to go to the Kentucky Court of Appeals as to whether or not I have to provide, in a case of this nature, the trial Judge a list ahead of time of who I intend to put on. This rule was not invoked relative to the Commonwealth. You are, to my humble way of thinking, I mention this in behalf of my client, that the defendant, Narvel Tinsley, in such case, is not getting due process, or equal protection of law, that he's getting what we call selective enforcement applied against him.

The Court: If you don't want to do it that way, here's what I will do. Every witness you call, not every witness, but when I know it's a newsman, I'm going to bring him back in Chambers after he's sworn, and I'm not going to listen to the same arguments in every case. I'm going to take him back here and he's not testifying, based

[1918]

upon what the witness tells me, if he tells me he knows nothing about the case, then we're going right back out there. We're not going to sit back here and argue the thing for 30 minutes. Everytime we come back here, we go over the same thing over and over and over and I'm going to move this trial on, one way or the other.

Mr. Taylor: May I say in response to that, Your Honor, the defense just took the case yesterday afternoon, Your Honor, that was in our 8th day of trial, please. We started, sir—

The Court: (interrupting) Which truthfully should have been in about the third day of trial.

Mr. Taylor: Well, that's no reflection on the defense, is it, Your Honor?

The Court: No comment.

Mr. Taylor: Well, will you give me just maybe five minutes to look through my stuff?

The Court: (Nodding head affirmatively.)

Mr. Taylor: Thank you, Your Honor. May I be excused now?

The Court: Take 10 minutes.

Mr. Taylor: Thank you, Your Honor.

[1919]

(End of proceedings in Chambers.)

IN OPEN COURT

The Court: Call your next witness.

Mr. Taylor: Your Honor, I'll call at this time Mr. Frank Clifford.

FRANK CLIFFORD, called as a witness by the defendant, Narvel Tinsley, having been first duly sworn, was examined and testified as follows:

The Court: All right, Mr. Clifford, will you step in my Chambers, please, sir, and all attorneys, in Chambers.

Ladies and gentlemen, step back in your room. We'll see if we can't send you to lunch now, to be back at 1:00, with the same admonition not to discuss the case.

(Whereupon, at 11:25 A.M. Sheriffs were duly sworn to take the jury to lunch, but before Court was recessed for the lunch break, the following proceedings were had in Chambers.)

[1920]

IN CHAMBERS

The Court: What goes on here, Mr. Clifford, is not to be reported. The ruling I make is immaterial to me. As far as I am concerned you can print that, but don't discuss what went on, what you said, and all that.

Mr. Taylor: Your Honor has called us in Chambers.

The Court: Yes, we're in Chambers again with the witness called by the defendant, Narvel Tinsley, Mr. Frank Clifford, who has already been sworn.

Examination

By the Court:

Q. Mr. Clifford, the Court is asking you, sir, do you know anything about the merits or the facts of this case, of your own personal knowledge?

A. I may. It's a hard question to answer. I have done research into aspects of the case, and I don't know that what has been disclosed to me are facts, or not.

Q. Are you saying what testimony you would

[1921]

have would be based on what someone else told you?

A. Yes, sir.

Q. You have nothing then of your own personal knowledge that you could state?

A. I don't believe I do. Let me stop here and say that I understand I have been called on the basis of an article I wrote. I haven't looked over that article recently. It might be a good idea that I look at it.

The Court: All right. Go ahead and look at it.

(Whereupon, the witness reread the article.)

The Witness: To the extent that this article is reproduced, which, I don't know how much of it was torn off, I imagine there's a little bit left—

Mr. Taylor: (interrupting) Here you are, I didn't purposely withhold that. I didn't know it was part of that article. Apparently my staff didn't tape it. Someone will have to be fired.

The Witness: This article is based on what people have told me, with the exception of some statistical records that I gained about population and

[1922]

incidence of crimes in the Smoketown area which is based, I understand, on public record or records I saw.

The Court: Can I see it, please?

The Court is going to rule this witness cannot testify. He has nothing of a material nature to add to the case.

Mr. McCall: Judge, it is possible he might know, based upon talking with people out in the Smoketown area people indicated to him Officer Hayes' reputation—

The Court: (interrupting) He can't base it on hearsay. He's testifying strictly from hearsay.

Mr. Taylor: Your Honor, may I respond to that, please?

The Court: He doesn't know Officer Hayes. He knows, based on somebody else's knowledge.

Mr. McCall: That's right. I think that's actually the test, though, knowledge he gets from people in the community.

The Court: I think you have to get some person in that neighborhood who knows that reputation, to put it on.

[1923]

Mr. Taylor: Will you let us—excuse me, was the Court finished?

The Court: Yes.

Mr. Taylor: Will you let us put such a person on, please? We have them.

The Court: If his character is in issue. I don't know if it's been put in issue.

Mr. Taylor: It's not going to be put in issue, if you don't allow me to do it.

Mr. McCall: Well, Judge, I don't believe his character has to be in issue on that question alone.

The Court: If you've got somebody that knows his general reputation.

Mr. Taylor: Hayes, sir?

The Court: Yes, or either officer.

Mr. Taylor: Thank you, Your Honor.

The Court: But you can't get into specific acts. The law is very specific. It's the general reputation.

Mr. Taylor: All right. Thank you, Your Honor. Now,

will you permit me to do this? Will you permit me merely to use this—pardon the expression, please—to request this newsman to at least authenticate that article for the jury?

[1924]

The Court: No.

Mr. Taylor: You're not going to let that into evidence?

The Court: No, the article? Absolutely not.

Mr. Taylor: Well, if you please—

The Court: (interrupting) You can put it in in Chambers here.

Mr. Taylor: As an avowal?

The Court: As an avowal as to what it is and—

Mr. Taylor: (interrupting) May I do that then and would the record so reflect, Your Honor.

Now, may I say further, would the Court permit me, and I promise I'll give it back to Mrs. Klapheke, to work from it?

The Court: (Nodding head affirmatively.)

Mr. Taylor: Thank you. I give you my word, Your Honor, I'll give it back to Mrs. Klapheke.

May I, again, please, place a very strong objection to the Court not permitting this witness to testify, and state to Your Honor that part of the theory of the defense here is that the actual empirical evidence against Narvel Tinsley, and that is the legally acceptable and the convicting-type evidence is so totally defunct,

[1925]

deficient and non-existant, that in its zeal to find two habitues for death row to atone for the death of two police officers, that the entire power structure in this county and community have been brought to bear against Narvel Tinsley, Jr., my client. This being the case, I earnestly suggest that Your Honor would be correct in ruling that I have a right to show this framework, this framing framework, to use a clumsy phrase, this includes the newspaper.

For instance, I thought it included channel 32, out there photographing evidence while it was being gathered.

Mr. Rosenbaum: Can we ask that the witness be excused, Judge?

Mr. Taylor: Well, that's the end of my—

The Court: (interrupting) As I stated before, Mr. Taylor, I'm not—I don't have a crystal ball. I don't know if I'm entirely right or wrong. I'm calling the shots as I see them—

Mr. Taylor: (interposing) Well, wouldn't it be well—

The Court: —and what I'm doing is I differ with you on that. I don't think you're correct. If you think you are, then the Court of

[1926]

Appeals will probably tell us both we're wrong.

Mr. Taylor: Your Honor, if Your Honor thought that it was marginal in the Court's decision, would it not be well under our philosophy as civilized men in the Western Hemisphere to err in favor of the defendant?

The Court: I don't think it's that close a question.

Mr. Scott: Well, Judge, would it be the Court's ruling, too, that we couldn't call him on our behalf to prove the character and reputation?

The Court: That's right.

Mr. Fleming: This time, I just request,—

The Court: (interposing) Not this man.

Mr. Fleming: —that we be able to elicit some testimony from him as to what process he followed in obtaining information which he reported, and that by avowal, not out in front of the jury, so that the record may show whether or not he knows the reputation of this officer in that community and then the Court can make its decision whether he is permitted to testify, or not to testify, and that's all we're asking the Court. We don't want to show out there in front of the jury anymore

[1927]

than anyone else, but we feel that it is quite possible that this man has competent evidence to offer and we'd like to move the Court to—

The Court: (interrupting) All right, go ahead by avowal.

EXAMINATION

By Mr. Fleming:

Q. State your name, please?

A. Frank Clifford.

Q. I believe you're employed as a reporter for the Louisville Times, is that correct?

A. Yes, sir.

Q. You're assigned to a particular type of reporting?

A. Law enforcement.

Q. And in your capacity as a reporter for the Louisville Times in the area of law enforcement, did you have occasion to write a story relative to the attitude of the public in the Smoketown area of Louisville, relative to a deceased police officer, Wilbur Hayes?

A. Yes, sir.

Mr. Fleming: For the sake of brevity, could I lead him a little?

The Court: This is by avowal anyway.

* * * * * * *

[1951]

Mr. Schroering: My opinion, Your Honor.

The Court: Sustained.

31. May we know, now, you've mentioned two press conferences, what was the first of the two?

A. I believe the first press conference was the night of the identification of the defendants.

Mr. Taylor: Your Honor, I would like to be on the record, please, and move the Court on a matter extrinsic to the now direct examination.

The Court: Approach the Bench.

Mr. Taylor: Thank you, Your Honor.

(Conference at Bench, out of hearing of jury.)

The Court: What's your motion?

Mr. Taylor: My motion is that you cause to be brought before you a person in the hall known as Miss Iona Burton, who is seeking to obtain ingress to this room. There are 14 empty seats. I have just seen them.

The Court: Don't—I don't want to

[1952]

hear this again, Mr. Taylor. You're overruled.

Mr. Taylor: Would you please listen—

The Court: (interrupting) Are you through with this witness?

Mr. Taylor: I have something helpful to the Court. Would you hear this much, please, that one of those empty seats was just taken by a policewoman known as Barbara Markwell. I'm suggesting to Your Honor that there are now 13 empty seats—

The Court: (interrupting) Mr. Taylor, I don't want to hear that motion again, sir. Overruled.

Mr. Taylor: If it please the Court, if this situation continues to change—

The Court: (interrupting) I've ruled on your motion. Proceed with—

Mr. Taylor: (interrupting) May I have strong exception, please, and may I request again that the Court bring in—

The Court: (interposing) Overruled.

Mr. Taylor: —the non-police—may I have my exception.

(End of proceedings at Bench.)

[1953]

The Court: Proceed.

Mr. Taylor: Certainly.

32. Now, you mentioned press conferences—there was a problem for the policewoman to get in the room here—which press conferences are you talking about?

The Court: Sustain the objection.

Mr. Taylor: What objection?

The Court: The Court's own objection.

Mr. Schroering: Continuing objection—

Mr. Taylor: How is he going to make a continuing objection? I don't keep talking about the same thing. What's a continuing objection? Everything I say, he objects to!

The Court: The Court sustained its own objection.

33. What was the day of the press conference you attended?

Mr. Schroering: Objection, Your Honor.

The Court: Sustain the objection.

34. What was the date of the other press conference?

Mr. Schroering: Objection, Your Honor.

The Court: Sustained.

35. Was Chief Hyde present at the press

[1954]

conference?

Mr. Schroering: Objection, Your Honor.

The Court: Sustained.

36. Was the television present at the press conference?

Mr. Schroering: Objection, Your Honor.

The Court: Sustained.

37. Was the County Judge present—I should be saying subjunctively were.

The Court: Sustained.

Mr. Taylor: Pardon my grammar.

(Whereupon, there was an outburst of laughter in the courtroom.)

38. Were other persons present at the press conference?

The Court: Sustained.

39. Do you know of any other time—

The Court: (interrupting) Mr. Sheriff, clear the back rows out of the courtroom, please.

I'll see Mr. Taylor in Chambers and this witness and the attorneys.

Ladies and gentlement, take your seats in your jury room, with the same admonition.

[1955]

Mr. Sheriff, clear it all out except the first three rows—that's out of the courthouse.

IN CHAMBERS

The Court: We're back in Chambers again as the result of Mr. Taylor's actions. He had on the stand Mr. Irv Foley, who is also in Chambers.

Mr. Foley, do you know anything about this case, other than the t.v. appearances? Do you know anything about the merits of the case at all?

Mr. Foley: I did no investigation myself. I know nothing.

The Court: All right. The Court is ruling that this witness will not testify anymore.

Now, Mr. Taylor, let me tell you something. You are going to immediately submit to this Court every witness that you have, and

[1956]

I mean in five minutes, and you are also in contempt of Court for your actions in—

Mr. Taylor: (interposing) I'm going to request—

The Court: —the Court just previous to that.

Mr. Taylor: May I request to speak to the record, please?

May I request to speak to the record, please?

The Court: I have given you till quarter till two. It is now 25 minutes till two to submit your witnesses. You can speak to the record all you want to, sir.

Mr. Taylor: At this time I would move the Court to reconsider his ruling in this regard as being prejudicial and hampering this defense, inasmuch as it causes me to have to reveal my—if you please—strategy or planning in making the defense.

The Court: That order is to the Court only, in camera.

Mr. Taylor: May I say to Your Honor, I didn't understand that was the case. I am sure that that being the case, I could rely and I'm sure have the

[1957]

Court's commitment that it would be thus held, won't it, Judge?

The Court: Absolutely.

Mr. Taylor: Thank you. Now, may I say, additionally, I have serious doubts as to the legal correctness of the order and since we have, I have, I don't know, five months of my life wrapped up in this case, and maybe more than that—

The Court: (interrupting) Before it's over, you might have a lot more than that.

Mr. Taylor: Would the Court care to amplify on the meaning of that?

The Court: The Court just made a statement.

Mr. Taylor: Sir, I didn't—

The Court: (interrupting) The Court just made a statement.

Mr. Tayor: Yes, sir, and I asked if the Court would care to expand on the meaning of—

The Court: (interrupting) I don't have to explain my comments.

Mr. Taylor: I see. I'm requesting that you reconsider and that you adjourn until tomorrow and give me an opportunity to get before our reviewing court for a Writ of Mandamus—

[1958]

The Court: (interrupting) Overruled.

Mr. Taylor: I wonder if I might finish my sentence before you overrule—

The Court: (interrupting) It's overruled.

Mr. Taylor: May I please finish my sentence, Your Honor?

The Court: You're on the record.

Mr. Taylor: Is that yes?

The Court: You're on the record.

Mr. Taylor: Thank you, Your Honor. What I was saying, before I did not finish my sentence was, if Your Honor would permit me to reach the Court of Appeals in an attempt to get a Writ of Mandamus against your ruling, which I feel is totally devastating to make a proper defense herein under the law.

The Court: Overruled.

Mr. Taylor: All right. Now, would Your Honor consider just a few more minutes and I'll, of course, remain, as ever, responsive to the orders of the Court. There is a mechanical problem here. I'll go get my list together as quickly as I can. I assure the Court I'll act in good faith. May I say to Your Honor—no, may I obtain clarification from you, Judge, that the names

[1959]

of the witnesses do not necessarily have to tell you what my—you want names, Judge?

The Court: I just want to know who you're calling.

Mr. Taylor: All right, may I be excused for the purpose you said, right?

The Court: Right.

Mr. Taylor: Thank you, Your Honor. Oh, Judge Hayes, if you please, Your Honor, and on the record, it is problematical in two aspects relative to the list that you've called for, No. 1, sir, it's still, if I've used the correct word, discretionary— it's still unresolved with me as to whether I will use certain people. I understand Your Honor will want a full list, but understand, please, I don't necessarily

guarantee that they will be used. Additionally, Judge, there are people being sought whose identity I do not know and with the Court's permission, I will call them X, Y and Z and append after their names, a very brief description of what is sought to be elicited from them. Is that satisfactory?

The Court: All right.

Mr. Taylor: Thank you, Your Honor.

Mr. Scott: Judge, could you show an objection on behalf of the defendant, William Michael

[1960]

Tinsley, to the Court's order clearing the last three rows in the courtroom.

The Court: The Court cleared the last three rows because they were back there snickering, making commotion. Everytime Mr. Tayler opens his mouth, they snicker or make motions, wave, or do something and I'm in no way required to put up with that in a court of law. I'd clear the whole courtroom, period.

Mr. Scott: Further, show that the defendant, William Michael Tinsley, renews his objection heretofore numbered 1 and renews his motion for a severance, based upon the conduct of counsel for Narvel Tinsley. This, of course, has now become so accumulative that the defendant, William Michael Tinsley's rights to a fair trial have been severely prejudiced.

The Court: Overruled.

(Whereupon, an off-the-record discussion was had.)

Mr. Taylor: Your Honor, are we on the record?

The Court: We'll go on the record again.

[1961]

Mr. Taylor: Thank you. At this time, pursuant to the order of the Court of some minutes back, to which strong exception was taken in behalf of the defendant, Narvel Tinsley, but, nonetheless, pursuant to the order of

the Court, I respectfully tender to Your Honor, with the understanding that it's tendered to the Court only and with the understanding that the information will not be furnished to the Commonwealth or to the attorneys for the other defendant.

The Court: That's true.

Mr. Taylor: Thank you, Your Honor. A list of the intended witnesses to now be called in behalf of the defendant, Narvel Tinsley, you will notice, please, that I do request since we're here, that A and B be brought in camera, if you will permit, to establish my contention of earlier, which I think perhaps irritated the Court. Notice, further, if Your Honor please, as to the given name of item D, that there is no positiveness on my part. Additionally, Your Honor will note the addition, due to an oversight on my part, in the haste of the situation of item H-1 between item H and item I. Additionally, I believe item K and L will be self-explanatory. May I further advise, in regard to item M, that I do not, at this time, have the first name of the

[1962]

subject, but hope to be able to get it. In item R, the abbreviation Det. is for Detective. I notice that the Zerox—my copy failed, but you have a clear copy, I believe, Your Honor, all the way through to Z. Item Y should be preceded by the title Detective.

The Court: Have these people been subpoenaed?

Mr. Taylor: Yes, Your Honor, I'd say in 98 percent—

The Court: (interrupting) So, they're here?

Mr. Taylor: Yes—well, Your Honor, I have made accommodating arrangements, sir, with some of the police officers so that they would not waste a day's work and they are on nearby call. Further, may I advise Your Honor there is a subpoena deficient—that's not what I mean to say—that there is not—that's still not—further, may I advise the Court, I have not as yet subpoenaed item H-1 and item D as in Dan.

The Court: I'm going to call each of these witnesses that I have marked here with a check mark to the witness stand, out of the hearing of the jury. The Court is going to question these witnesses as to their knowledge

[1963]

of this case. I'm going to—I have 18 of them. So, by the time we do that, I think probably it will be time for the jury to disperse. So, I think what I'll do is send them back to their motel room until in the morning. This is going to take a little while.

Mr. Taylor: May I say to Your Honor, would I be incorrect in saying that by so doing, Your Honor is placing its judgment as to what witnesses should be called for the defense above and beyond that of the defense lawyer for Narvel Tinsley.

The Court: The judgment of the Court is that if, for instance, No. G on your list—

Mr. Taylor: (interposing) Yes, sir.

The Court: —should know absolutely nothing about the facts of the case, then I'm not going to let him testify. I'm not going to conduct this trial as a marathon, just to see how long we can run it. Anybody who has anything material, relevant evidence to introduce, will be permitted to testify.

Mr. Taylor: May I respond respectfully to that, Your Honor. The Court will note that the defense has begun today—no, I'm corrected—I would

[1964]

like to correct myself—the defense began with witnesses late yesterday afternoon. That, Your Honor, we were into the 8th day of trial. We are now into the 9th and no such procedure was applied to the Comonwealth—

The Court: (interposing) That's true.

Mr. Taylor: —as what Your Honor is now applying to the defense, projected defense of Narvel Tinsley. May

I further implore Your Honor to consider that the theory of defense here, as has already been repeatedly stated to Your Honor, is a wide ranging theory in the circumstances hereof. If you are going to conduct such a hearing, would it be fair to suggest—it is over my objection—would it be fair to suggest that similarly, as the attorneys for William Michael Tinsley have been in camera with Your Honor and with William Michael Tinsley, and without myself being present, or being allowed to be present, would it be fair that when you conduct these—well, if you'll pardon me, I can't think of a better way to put it—this checking conversation—I don't mean that as an offensive phrase—in regard to each person on the list, that I be present and my client be present, and that the other lawyers be excluded. Let me say why, Your Honor. Now—

The Court: (interrupting) I didn't understand you.

[1965]

Mr. Taylor: I'm trying—I'm reaching for what I'm trying to say, and if I put it crudely, I don't mean anything disrespectful—

The Court: (interrupting) You mean make these other attorneys do the same thing?

Mr. Taylor: Sir?

The Court: Do the same thing—

Mr. Taylor: (interrupting) Handle it the same way you did William Michael, or else they're going to know who I'm going to call. I know that these gentlemen are not going to sit out there and spy. We have not made one another privy to our defenses, because of antagonistic defenses. We have tried to deal as gentlemen with each other, but you had assured me that you would keep it—at least I got that understanding—my strategy of defense in confidence.

The Court: You want me to exclude Michael and his attorneys when I go through this list, out of the hearing of the jury?

Mr. Taylor: Yes, sir, and the Commonwealth. I'll tell you, I could, if you thought it represented a security problem, waive my defendant being present.

The Court: I don't care about the

[1966]

defendant being here.

Mr. Taylor: That's what I'm requesting of you, Judge.

Mr. Fleming: No objection.

Mr. Schroering: No objection, Judge, if you want to listen and pass on the relevancy and admissibility and all of this evidence, I think it's within your right to do so.

Mr. Fleming: You understand we aren't waiving any objection we may have to the relevancy and admissibility of it, once we are parties to it.

Mr. Schroering: Same with the Commonwealth.

The Court: But Mr. Taylor is stating that when I do this, you'll know—well, I haven't checked everybody on here, but you will at least know some of them. Of course, if they're excluded, it won't make any difference, but some of them might not be excluded.

Mr. Schroering: So this will not develop into a discovery procedure for the benefit of Mr. Taylor in preparation of a defense, the Commonwealth would only suggest that—

The Court: I'm the one who's going to

[1967]

going to ask the questions.

Mr. Taylor: May I know if possibly before you call each party, you would feel like being guided by certain suggestions I might have?

The Court: I assume that these people are under subpoena they should be here, with the exception of the police officers.

Mr. Taylor: Yes, sir.

The Court: I'm going to have to tell Detective Boyer, or somebody, to go get these police officers.

Mr. Taylor: Well, I can help you get them, if you will permit.

The Court: Somebody is going to have to notify them all to come.

Mr. Taylor: All right, sir. I can tell you pretty much —there are quite a few of them here right now, Your Honor. Would you want me to go work on that aspect of the case?

The Court: Yes, you go work on that and I'll recess the jury.

Mr. Taylor: Yes, sir, thank you, Your Honor. May I be excused?

The Court: Yes.

* * * * * * *

[2014]

37. I noticed in there, I was trying to listen—did he tell you—you were present at this time, weren't you?

A. Yes, sir.

38. And so you recall this, I suppose, quite well, would that be true?

A. Well, it's here, I could check it.

39. All right, so I'm trying now, Detective, to check a couple of things with you. This young man, Keith White, he told you that he had lied to the policemen when they asked him if he lived there, is that right?

Mr. Fleming: Objection, Your Honor, the statement speaks for itself.

The Court: That's right.

Mr. Taylor: I just—the officer was there. He said he recalled—

The Court: (interrupting) Are you talking about outside of the statement?

Mr. Taylor: No. I'm talking about—I'm just merely asking this witness he was there when David Keith White was telling what happened, am I not correct

[2015]

that David Keith White told you that he told the policemen

when they said, "What are you doing here," that David Keith White said, "I live here."

Mr. Fleming: Same objection, Your Honor. The statement speaks for itself.

Mr. Taylor: Is that a difficult question?

The Court: Sustained. We're not going to rehash the statement. The jury can read it.

40. Let me know this from you, though, outside of the statement, David Keith White never told you that he saw Narvel with any pistol at all, did he, Jesse?

A. No, he didn't say—

41. (interrupting) As a matter of fact, what he told you about Narvel, is all included in that statement, right?

A. Right.

42. It would be accurate to say that every single thing he told down there at the Police Department, this is when the statement was getting made, right?

A. This is when the statement was made.

43. Is encompassed in that statement, right?

A. Right.

44. And he told you, in regard to Officer

[2016]

Schaefer, who was the officer who didn't fall into the car door, but the one that was standing by the car, that he saw Michael pointing a pistol at him, right, sir?

Mr. Fleming: Objection, if the Court please. This is the same thing the Court just ruled on.

The Court: Sustained.

Mr. Fleming: The statement speaks for itself.

45. And he didn't say word one to you at that time to you at that time about seeing Narvel pursuing anybody, did he?

Mr. Fleming: Same objection.

The Court: (Rapping on Bench.) All right.

46. Yes or no?

The Court: Approach the Bench, Mr. Taylor.

(Conference at Bench, out of hearing of Jury.)

The Court: The Court, out of hearing of the jury, the Court finds Mr. Taylor in contempt of Court again for his actions.

[2017]

Mr. Taylor: May I have my exception.

The Court: All right.

Mr. Taylor: May I reserve the right to speak to the record shortly?

The Court: When we have recess.

Mr. Taylor: Thank you, Your Honor.

Mr. Fleming: I want to make a motion. We again move the Court to set aside the swearing of the jury and grant a new trial to William Michael Tinsley. Mr. Taylor, in effect, is arguing the case. He was instructed by the Court to stay within that statement. He defied that admonition and went on into this line of questioning designed to argue the case, to emphasize those points which are favorable to him and unfavorable to William Michael Tinsley.

The Court: Overruled.

(End of proceedings at Bench.)

* * * * * * *

[2030]

Redirect Examination

By Mr. Taylor:

22. Well, now, we've talked about how you were assigned to stay with him. Were you at either of the two press conferences where it was announced to the world that the warrants had been taken?

A. No, sir, I was not at no press conference.

23. At any press conference?

A. At any press conference.

Mr. Taylor: Thank you. Pardon me.

24. Were you at the autopsy when—

Mr. Schroering: (interrupting) Objection, Your Honor.

The Court: Sustained.

25. Were you down there gathering evidence when the t.v. cameras were there?

A. Yes, sir, I was.

26. Isn't it a fact that down there in the alley, even before the arrests were made, a certain newsman of this city—

Mr. Schroering: (interrupting) Objection, Your Honor.

The Court: Sustained.

[2031]

27. Were there t.v. cameras there? Look at me.

A. Yes, sir, there were t.v. cameras down there.

28. Thank you, yes, sir. When Narvel Tinsley was brought in, I suppose there was a good deal of—did you feel tension and pressure in the situation?

A. Not really, no.

29. Did the defendant seem to be under a bit of strain?

A. He was visibly agitated, yes, sir.

30. He wasn't exactly what you'd call garrulous. There wasn't a great spirit of camaraderie obtained in the basement of the old Police Department, was there?

A. No, I couldn't say there was a spirit of camaraderie, no.

Mr. McCall: Show our objection to the waving of the arms of Mr. Taylor—

The Court: (interrupting) This witness is excused. I'll see counsel in Chambers. Let's take a five minute break, ladies and gentlemen, with the same admonition.

[2032]

IN CHAMBERS

The Court: Let the record show that Mr. Taylor is in contempt for the seventh time for his actions in the courtroom.

Mr. Taylor: May I respond to the record?

The Court: (No response.)

Mr. Taylor: May I please, Your Honor?

The Court: Go right ahead.

Mr. Taylor: I'd lige to state to the record—I'd like for the record to show that the Court has gotten up and left the room, closing the door behind him and that there is present in this room Bob Fleming, Mr. Rosenbaum, Mr. Schroering, Mr. Foley, Mr. Scott, Mr. McCall, and Mr. Kagin, as well as myself and Mrs. Klapheke. The Court has now returned to the room.

In behalf of the defendant, Narvel Tinsley, may the record reflect that at no time has Mr. Schroering been held in contempt—

The Court: (interrupting) I'm not going to even—don't even put this in the record. Mr. Taylor is not running this Court, I am.

[2033]

(Whereupon, there was an off-the-record discussion and colloquy, after which the following proceedings were had.)

The Court: Overruled. Let's go. Call your next witness.

Mr. Taylor: I want the record to show right now that there was a colloquy took place in this courtroom and that the Court, by direct order, stopped the reporter from taking it down. What time is it?

The Court: (No response.)

Mr. Taylor: I'm asking you what time is it?

The Court: Two minutes before 11.

Mr. Taylor: At two minutes till 11 on this—what date—October 28, 1971.

(End of proceedings in Chambers.)

[2034]

IN OPEN COURT

The Court: All right, call your next witness.

Mr. Taylor: Your Honor, may I have Chief Hyde, please?

The Court: Is Chief Hyde out in the hall?

The Sheriff: No, sir.

The Court: Call your next witness.

Mr. Taylor: I called him. Chief Hyde.

The Court: He's not here. Call your next witness.

Mr. Taylor: May I have an objection in the record, please?

The Court: Overruled.

Mr. Taylor: May I have Detective Jesse Francis?

The Sheriff: They'll have to go upstairs and check.

The Court: Pardon?

The Sheriff: They have to go upstairs

[2035]

and check.

The Court: All right, call your next witness.

Mr. Taylor: I did. It is Detective Francis.

The Court: Call your next one, he's not here.

Mr. Taylor: May I have an objection, please?

The Court: Overruled.

Mr. Taylor: Thank you, Your Honor. All right, Your Honor, my next witness is Detective Byrd.

The Court: Detective Byrd?

Sheriff: He's gone to the office.

The Court: Pardon?

Sheriff: He's gone to the office.

The Court: All right, call your next witness.

Mr. Taylor: I have, I called Detective Byrd.

The Court: He's not here. Call your next witness.

Mr. Taylor: May I have an objection, please?

[2036]

The Court: Overruled.

Mr. Taylor: May I approach the Bench, please?

The Court: Yes, sir.

Mr. Taylor: May I be on the record, please?

(Conference at Bench, out of hearing of jury.)

The Court: Other counsel please approach the Bench.

Mr. Taylor: If it please the Court, my office people and myself have, I think, complied with the law in issuing subpoenas for the attendance of these witnesses. It is part of the proper and adequate defense of my client, to which he is entitled under law—

The Court: (interrupting) Francis is here? O.K., bring him up.

Mr. Taylor: —that these witnesses be placed on this stand when I call them myself, in the order that I call them. Absent floods or Acts of God, I request that the Court permit this to be the case.

The Court: I am not going to hold up

[2037]

these proceedings waiting for a witness. If he's here he can testify, if he isn't, we'll skip over him.

Mr. Taylor: May I object to that, please.

Mr. Schroering: Judge, may I place this in the record, please? When Mr. Taylor came back off of this last recess, he indicated his next witness was going to be Garrett. No—apparently no arrangements have been made to notify any of these people as to the approximate time they were to be here. I noted with some interest he meticulously avoids calling any of the witnesses that are sitting outside the courtroom. By process of elimination, he calls only those he knows are not sitting out there, obviously for the purposes of delay. Lieutenant Garrett is outside—

The Court: (interrupting) We're not going to permit that.

Mr. Schroering: And so is Francis outside.

Mr. Taylor: Your Honor, I'll respond to that?

The Court: Here's Lieutenant—

Mr. Taylor: (interrupting) I'll

[2038]

respond to that, Your Honor, in the record. I totally deny the allegations.

The Court: All right. Here's Lieutenant Francis.

Mr. Taylor: Commonwealth Attorney, I have no idea who's out there. When I'm out there I'm doing something else. Mr. Schroering has incorrectly stated to Your Honor the situation and Your Honor knows it, because these people were, in the main, brought before you yesterday and recognized to be back here this morning. Additionally, their subpoenas so state and what Mr. Schroering told you is not factually true.

(End of proceedings at Bench.)

* * * * * * * *

[2068]

JAMES GARRETT, called as a witness by the defendant, Narvel Tinsley, after being first duly sworn, testified as follows:

The Court: All right, let's go.

Direct Examination

By Mr. Taylor:

1. Your name, sir, is Lieutenant James Garrett?

A. Yes, sir.

2. And you are a police officer in the City of Louisville?

A. Yes, sir.

Sheriff: Judge, he (one of Mr. Taylor's

[2069]

aides) was not searched as everyone else was.

Mr. Taylor: Search him right now.

The Court: All right, go ahead, Mr. Taylor. Get going.

Mr. Taylor: May I be on the record?

The Court: Let's move it.

Mr. Taylor: I don't want to move it to the exclusion of—

The Court: (interrupting) All right. Let's go back in Chambers again. I'll see counsel in Chambers. Bring the witness.

IN CHAMBERS

The Court: The Court finds Mr. Taylor in contempt of Court again.

Mr. Taylor: May I speak to the record, Your Honor?

The Court: No, sir. What are you going to ask this witness?

Mr. Taylor: What am I going to ask him?

The Court: Yes, sir.

Mr. Taylor: Yes, sir. All right, sir,

[2070]

I—

The Court: (interrupting) Speak up, I can't hear you.

Mr. Taylor: All right. Can you hear me now?

The Court: Yes, sir, keep your voice that way.

Mr. Taylor: All right, sir. I have a total of one, two, three, four, five, six, seven, eight, nine questions, Your Honor, that I would like to ask.

The Court: Read them into the record.

Mr. Taylor: Your Honor, I'm going to take strong exception to being required to do that.

The Court: All right. He waives them, then. You're excused, Lieutenant Garrett.

Mr. Taylor: Wait—

The Court: (interrupting) You want to read them into the record?

Mr. Taylor: Are you putting me on an either/or basis?

The Court: That's right.

Mr. Taylor: May I say that reading them in the record is done over the objection of the defendant, Narvel Tinsley. May the record so indicate, please?

The Court: So indicated.

[2071]

Mr. Taylor: All right. I wanted to ask Lieutenant Garrett if, indeed, he was head of Homicide Department at that time.

The Court: That's been covered already.

Mr. Taylor: And then—are you saying that if a witness has covered the point—

The Court: (interrupting) That's exactly what I'm saying.

Mr. Taylor: You're not going to—

The Court: (interrupting) Every witness that you've introduced so far today has added nothing to this case. Every witness that you've introduced, most of them have been on the stand already. You're not going to rehash this. If the question has been asked and covered, the Court is not going to permit you to go into it again.

Mr. Taylor: May I say, Your Honor—

The Court: (interrupting) There comes some point in time that this thing has to end. I cannot permit any attorney to put a man on, then he gets off, then put him back on, and he gets off and he puts him back on on the same,

[2072]

same testimony.

Mr. Taylor: May I respond to that, Your Honor?

The Court: What's the other questions?

Mr. Taylor: I'm requesting permission—I have the other questions, Your Honor, I'd be glad to read them, sir.

The Court: All right.

Mr. Taylor: What I wanted to say, relative to what the Court just said, Your Honor will know that we are in the 10th day of trial and I didn't take the defense until eight and a half, in other words, until after noon day before yesterday and I'm about ready to close. I, at lunch, went through my witnesses, trying to do what is right, from the standpoint of everybody else's rights, but on the other hand, I want to represent—

The Court: (interrupting) I'm not trying—I'm just trying to get this thing moving and get these witnesses off who have already testified. Lieutenant Garrett has already testified, he's the head of Homicide.

Mr. Taylor: Judge, here's my problem Your Honor, and I really don't want to irritate the Court about this and I'm not putting this part of things in the

[2073]

motion. I've already put it in. You've got empty seats there and I work with a lot of students. Nobody ever asked me to do it, but that's the way it ended up being because we are as you know, not receiving a fee in this case. I'm not saying that's any different from the other lawyers on the defense side. Now, my helpers have been systematically excluded from the Court. There's a young student out there who was just placed out of the courtroom. You've got a whole row of empty seats. That's—

The Court: (interrupting) There's nobody that I know of that's been denied a seat in the courtroom, who wanted to get in.

Mr. Taylor: Your Honor, would you—

The Court: (interrupting) And it doesn't have a thing to do with this case. I'm not even interested in listening to it. I couldn't care less who's sitting out there in the audience.

Mr. Taylor: Your Honor, audience isn't particularly the word.

The Court: And the audience, what you're referring to, the audience, I think, if a count were taken, it is predominantly black. Let the record show that.

[2074]

Mr. Taylor: Your Honor, Charles Schultz is as Caucasion as you or I and there's a row of empty seats and he was just in your clear view and refused a seat. I wish you'd let him come in the courtroom.

The Court: I don't have any objection. Tell him to go—but he goes through the same procedure everybody does and he's searched, at the Court's order, and he's welcome to sit anyplace he wants to, as long as he's behind the rail.

Mr. Taylor: All right, thank you, Your Honor.

The Court: I thought I asked the police officer and he said—I said, "Is everybody in that wants in," and he said, "Yes."

Mr. Taylor: He was not correct in that. That's where the problem is.

The Court: O.K., let's go on.

Mr. Taylor: I want to ask Jim Garrett about fingerprints. It's true the officer's been here—

The Court: (interrupting) They've stipulated that there are no fingerprints in the case whatsoever on anybody.

[2075]

for Officer Garrett to identify weapons, especially the unfired 38.

The Court: We've already gone through all of that. Rossi has been identified, every gun in here has been identified by this officer.

Mr. Taylor: May I just ask, with the Court's permission, ask Officer Garrett and I'll waive—just informally.

EXAMINATION

By Mr. Taylor:

Q. Jim, you were in charge of the whole investigation, isn't that substantially so?

A. Yes, sir.

Q. You would be the gentleman who had control of the whole file, right, sir?

A. Yes.

Q. I don't know what chain of command is supposed

to follow, but Frank is a subordinate of yours, is that right, sir?

A. Yes, sir.

Q. The records and investigative findings in this matter would then be in your whole file, right, sir?

A. Yes, sir.

* * * * * * *

[2169]

204. But you speculated if you didn't, he might shoot you right on the spot, is that what you thought?

Mr. Schroering: Objections, he's putting words in his mouth.

Mr. Taylor: No, I want to know—

The Court: (interrupting) He testified to this.

205. So, actually, you didn't move the body to conceal the evidence for the Tinsleys, or you didn't move the body to conceal evidence that would relate Hamp Thomas to a crime, thus perhaps qualifying yourself as an accessory after the fact?

A. No, because I didn't move the body the day before.

206. Have you been charged with accessory after the fact in Hamp's case?

A. No.

207. Well, what charges are against you?

The Court: He testified none.

208. None?

A. No.

209. You haven't been charged?

A. No.

210. Have you talked with this nice police officer—

[2170]

Mr. Schroering: (interrupting) Your Honor, I want to interpose an objection.

(Whereupon, there was an outburst of laughter in the courtroom.)

The Court: Sustained.

211. Have you talked with the police officer?

A. Yes.

212. Have you been up there and talked with them a little bit?

A. Yes.

213. All right, now, as you said, you moved the bodies in the Hamp matter. Were you in on the theft of them when they stole from the bodies?

A. No.

214. Did you know Hamp got that watch?

A. No.

215. Did you know Hamp did things—

A. (interrupting) The bodies was moved before I got there—from the alley.

216. Did you move both of them?

A. No.

217. Did you know that Hamp moved both of them?

[2171]

A. I asked Hamp what to do about them and he said, "One of them slipped," or something.

Mr. Taylor: One of them what—

Mr. Fleming: (interrupting) This is what we're objecting to.

The Court: Sustained. Don't tell us anything Mr. Hamp (sic) told you, sir.

218. When you went back though for the gun, this was to help the Tinsleys, wasn't it?

A. Yes.

219. And they had asked you to do it and you knew then that it appeared they were implicated in two murders, didn't you?

A. I don't know if they shot the police or not, just hearsay.

220. As far as you're concerned, you really haven't got any evidence to offer on that, do you?

A. No.

221. On the other hand, on the other hand, the actual fact is you knew they were attempting to conceal themselves to keep from being arrested, didn't you?

Mr. Schroering: Your Honor, how many times are we going over—

Mr. Taylor: (interrupting) Your Honor, I want this young man to admit that you should have been

[2172]

charged with accessory after the fact—

The Court: (interrupting) Sustained.

Mr. Schroering: Objection.

Mr. Taylor: —and you haven't been, isn't that true?

Mr. Fleming: Your Honor, the jury should be admonished.

Mr. Taylor: Pass the witness.

Mr. McCall: Let me ask one question.

(At Bench, out of hearing of Jury.)

The Court: Let the record show that Mr. Taylor is in contempt of Court.

(End of proceedings at Bench.)

The Court: Are you about finished?

Mr. McCall: Yes, Judge.

* * * * * * *

[2241]

I want to try to close. I want to apologize to the Court if I have been intemperate and state to the Court that it would only have been because of the desire to see justice done and the clear conviction and belief that my client is innocent. I want to tell you that life has moved on since this case began. There's been a wedding in my family and

a funeral of a dear friend of mine. I want to say furthe
it's a lot more glamorous, a lot more pleasing to the crow
to be an official and thunder about dead bodies and thi
blue lines. But that's not always where the truth is,
think.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-473

DANIEL T. TAYLOR, III, - - - - Petitioner

vs.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

DORIS PETERSON
MORTON STAVIS
Center for Constitutional Rights
853 Broadway
New York, New York 10003
Attorneys for Petitioner

WESTERFIELD-GOETH CO., INC., 632 W. MAIN STREET, LOUISVILLE, KY.

INDEX

PAGE

Citation to Opinion Below 1

Jurisdiction 1– 2

Constitutional Provisions Involved 2

Questions Presented 2– 3

Statement of the Case 3– 8

Reasons for Granting the Writ 9–31

I. This Court Should Grant Certiorari to Determine the Substantial Question of Whether an Alleged Contemnor's Right to Trial by Jury on Multiple Contempt Charges Can Be Defeated by the Subsequent Actions of the Trial Judge or the Reviewing Court in Reducing or Modifying the Sentence so That the Total Sentence Imposed Does Not Exceed Six Months' Imprisonment, Thereby Converting the Offense Into a "Petty Offense," Within the Meaning of the Trial by Jury Guarantee 9–14

II. This Court Should Grant Certiorari to Determine the Substantial Question of Whether Due Process Requires That, When a Trial Judge Proceeds Summarily to Punish for Alleged Contempts Committed in His Presence, the Contemnor Must Be Given Some Opportunity to Be Heard in Defense or Mitigation Before He is Finally Adjudged Guilty and Sentence is Imposed 15–19

III. The Holding of the Court Below That the Trial Judge Could Impartially Sit in Judgment on the Multiple Contempt Charges Against the Petitioner is Clearly Inconsistent With the Decisions of This Court on the Question of Judicial Disqualification in Contempt Proceedings 20–28

PAGE

IV. This Court Should Grant Certiorari to Determine the Substantial Question of What Conduct on the Part of an Attorney Engaged in Zealous Representation of His Client Can Be Made Punishable as Criminal Contempt on the Ground That It Has Created a Material Obstruction to the Administration of Justice. 28–31

Conclusion. 32

Appendix. 33–59

Opinion of the Court of Appeals of Kentucky. 33–49

Order of the Court of Appeals Overruling Petition for Rehearing. 50–51

Order of the Court of Appeals Staying Execution and Enforcement of Mandate. 52–53

Corrected Judgment and Certificate of Contemptuous Action in the Presence of the Trial Court. . 53–57

Proceedings Upon Imposition of Punishment for Contempt. 58–59

AUTHORITIES CITED

Cases:

	PAGE
Arnett v. Meade, Ky., 462 S. W. 2d 940 (1971)	12
Baldwin v. New York, 399 U. S. 66 (1970)	9, 11, 13
Beasley v. Wingo, Ky., 432 S. W. 2d 413 (1968)	8, 10
Bloom v. Illinois, 391 U. S. 194 (1968)	27
Brown v. United States, 356 U. S. 148 (1958)	29
Brown v. United States, 359 U. S. 41 (1959)	16
Craig v. Harney, 331 U. S. 367 (1948)	29
In re Dellinger, 461 F. 2d 389 (7th Cir. 1972)	24, 27
Frank v. United States, 395 U. S. 147 (1969)	11, 13
Groppi v. Leslie, 404 U. S. 496 (1972)	15–16
Holt v. Virginia, 381 U. S. 131 (1965)	24
Johnson v. Mississippi, 403 U. S. 212 (1971)	16, 18, 20
Levine v. United States, 362 U. S. 610 (1960)	16
In re Little, 404 U. S. 553 (1972)	28, 30
Local No. 1667, United Auto Workers v. Kawneer Company, Inc., Ky., 490 S. W. 2d 747 (1973)	10
McBride v. Commonwealth, Ky., 432 S. W. 2d 410 (1968)	8, 10
In re McConnell, 370 U. S. 230 (1962)	28, 30
Mayberry v. Pennsylvania, 400 U. S. 455 (1971)	20, 21, 27
Mitchell v. Fiore, 470 F. 2d 1149 (3rd Cir. 1972)	13
Offutt v. United States, 348 U. S. 11 (1954)	20, 21, 23, 27
In re Oliver, 333 U. S. 257 (1948)	17
People v. Carr, 3 Ill. App. 2d 227, 278 N. E. 2d 839 (1971)	17
Sacher v. United States, 343 U. S. 1 (1952)	16
Ungar v. Sarafite, 376 U. S. 575 (1964)	24
United States v. Galante, 298 F. 2d 72 (2d Cir. 1962)	15, 17
United States v. Meyer, 462 F. 2d 827 (D.C. Cir. 1972)	20–21, 24–25
United States v. Seale, 461 F. 2d 345 (7th Cir. 1972)	10

Constitutional Provisions, Statutes and Rules:

	PAGE
U. S. Const. Amend. VI	2, 14
U. S. Const. Amend. XIV	2, 3
28 U.S.C. § 1257(3)	2
Kentucky Revised Statutes 436.020	11
Federal Rules of Criminal Procedure 42(a)	15
Federal Rules of Criminal Procedure 42(b)	18
Kentucky Rules of Criminal Procedure 11.04(1)	7

Other Authorities:

C. Wright, *Federal Practice and Procedure* § 708 (1969) 15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

DANIEL T. TAYLOR, III, - - - - - *Petitioner*

v.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of Kentucky entered in the above entitled case on March 23, 1973, petition for rehearing denied on June 15, 1973.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is reported at 494 S. W. 2d 737 and is printed in the Appendix, *infra*, pp. 33-49.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on March 23, 1973. A petition for rehearing was denied on June 15, 1973. The execution

of the mandate was stayed on June 15, 1973, for a period of 90 days to enable the petitioner to seek review of the decision in this Court. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

QUESTIONS PRESENTED

1. When a trial judge summarily imposes consecutive sentences on eight counts of contempt aggregating four and one-half years' imprisonment, including sentences of one year's imprisonment on two counts, whether he or the appellate court may subsequently, in order to defeat the alleged contemnor's right to trial by jury, reduce the sentences so that the sentence on

no one count exceeds six months' imprisonment and direct that the sentences run concurrently for a total of six months' imprisonment?

2. When alleged contempts have been committed by an attorney in the presence of the trial judge and the trial judge proceeds summarily to punish for contempt, whether due process requires that the attorney be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed?

3. Whether, in the circumstances of this case, the trial judge could impartially sit in judgment on multiple contempt charges against the petitioner?

4. Whether the conduct of the petitioner that formed the basis of the contempt charges can be made punishable as criminal contempt consistent with the Sixth Amendment's guarantee of effective assistance of counsel and the Fourteenth Amendment's guarantee of due process of law?

STATEMENT OF THE CASE*

The petitioner, an attorney, seeks review of the judgment of the Court of Appeals of Kentucky, entered on March 23, 1973, affirming his conviction for criminal contempt and imposing a sentence of six months' imprisonment. The contempt conviction arose out of events occurring during the trial of Narvel and William M. Tinsley on a charge of wilful murder. The petitioner represented Narvel Tinsley, working with-

*References to the transcript of the trial of *Commonwealth* v. *Tinsley* are indicated by the prefix "Tr."

out pay. The trial was held before the respondent (hereinafter referred to as the trial judge) in the Criminal Branch, Second Division, Jefferson Circuit Court, Louisville, Kentucky, from October 18, 1971, through October 29, 1971.

The defendants, young black men, were accused of killing two white police officers. The trial attracted a great deal of press and public attention, and was hotly contested. At various times during the trial the trial judge informed the petitioner that he was in contempt. He did not, however, specify what the charges were, nor give the petitioner any meaningful opportunity to respond to the charges. After the first count had subsequently been changed to a warning, there were eight counts of contempt. On counts 2 through 5 the trial judge did permit some discussion about what had led up to the citation, but it soon drifted into a discussion of the substantive issues. On counts 6 and 9 the trial judge simply informed the petitioner that he was in contempt (Tr. 2016, 2172). He permitted the petitioner to make a response for the record on count 7, but then directed the court reporter not to put the response in the record (Tr. 2032). He specifically refused to allow the petitioner to make a response for the record on count 8 (Tr. 2069). At no time during the trial did he impose punishment on any of the counts.

At the conclusion of the trial, after the jury had returned its verdict, finding both defendants guilty and sentencing them to death, but while the jury was still in the box, the following colloquy occurred:

"The Court: Mr. Taylor, the Court has something to take up with you, sir, at this time.

Mr. Taylor: Well, I'll be right here, Judge.

The Court: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law.* You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean it's based upon planned confusion.

Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule.—

Mr. Taylor: (Interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This

*Of interest is the fact that the bulk of this fifteen years was spent either as a Special Agent for F.B.I., or as an Assistant Commonwealth's Attorney (Prosecutor) in Louisville.

is not the way an officer of a court should conduct itself.

Mr. Taylor: I would respond to you, sir—

The Court: (Interrupting) You're not responding to me on anything.

Mr. Taylor: (Interrupting) Oh yes, I will.

The Court: Yes, you're not, either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One—

Mr. Taylor: (Interrupting) Unless you intend to gag me—

The Court: (Interrupting) I'll do that—

Mr. Taylor: (Interposing) My lawyers will respond to you—

The Court: (Interposing) I'll do that, sir.

Mr. Taylor: My lawyers will respond to you, sir.

The Court: You be quiet, or you'll—there will be some more contempts—

Mr. Taylor: (Interrupting) No, you heard what I said.

The Court: I have you on nine counts. First Count, 30 days in jail; Second Count, 60 days in jail, Third Count, 90 days in jail; Fourth Count, six months in jail; Fifth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

Take him away.

Mr. Taylor: We will answer you in court.

The Court: I'd be glad to see you" (Appendix, infra, pp. 58-59).

At the conclusion of this colloquy, the petitioner was placed in the custody of peace officers and taken to the Louisville City Jail. The trial judge refused to make

himself available to petitioner's counsel for the purpose of setting bail, and a bail hearing had to be ordered by the Court of Appeals of Kentucky. The trial judge refused to allow the petitioner to be present at the hearing, and also denied bail. Bail was finally ordered by the Kentucky Court of Appeals, and the petitioner filled same, and was released. On November 4, 1971, the trial judge entered an order prohibiting the petitioner from "further practice of law in this Court."

After the petitioner had filed his appeal in the Court of Appeals of Kentucky, the trial judge, weeks later, moved the Court of Appeals for permission to correct the judgment, and his motion was granted over the objection of the petitioner. In the corrected judgment the trial judge stated that the first count of contempt should be changed to a warning, and he reduced the sentence of one year's imprisonment imposed on count 8 and on count 9 to a sentence of six months' imprisonment on each count. He then set forth the sentences on each of the remaining counts, six of which were punished by six months in jail, one of which was punished by 60 days in jail and one of which was punished by 90 days in jail. He did not specifically state that the sentences were to run consecutively, as he did when imposing sentence from the bench, but he also did not state that they were to run concurrently[1] (Appendix, *infra*, pp. 53-57).

---

[1]Under Kentucky Rules of Criminal Procedure 11.04(1), the trial judge must specify in the judgment whether two or more sentences are to be served concurrently or consecutively, and if the

(Footnote continued on following page.)

In his appeal to the Court of Appeals the petitioner raised all of the issues presented in this Petition, and some others, as well. Specifically, he contended that under the Sixth Amendment he was entitled to a trial before a jury on the contempt charges, that his due process rights were violated because he was not given a full and fair opportunity to be heard in defense or mitigation and because the trial judge could not impartially sit in judgment on the charges, and that the conduct that formed the basis of the charges against him could not be made punishable as criminal contempt consistent with due process of law and with the Sixth Amendment's guarantee of the effective assistance of counsel. He also raised various state law questions. The Court of Appeals held that the order prohibiting the petitioner from the practice of law in the Second Division (i.e. the Court of Respondent) was improper under state law and set it aside. With respect to the petititoner's contention that he was entitled to a jury trial on the contempt charges, the Court held that the sentences should now be served concurrently rather than consecutively, and that since the total sentence would not then exceed six months, the petitioner was not entitled to a jury trial. In all other respects it affirmed the conviction and rejected the petitioner's Constitutional contentions. Petitioner's Petition for Rehearing to the Court of Appeals was denied on June 15, 1973, without comment.

---

judgment does not provide otherwise, sentences are construed to run consecutively. *Beasley* v. *Wingo, Ky.*, 432 S. W. 2d 413 (1968). Under Kentucky law the question of whether sentences should run consecutively is within the exclusive discretion of the trial judge. *McBride* v. *Commonwealth*, Ky., 432 S. W. 2d 410 (1968).

REASONS FOR GRANTING THE WRIT

I.

This Court should grant certiorari to determine the substantial question of whether an alleged contemnor's right to trial by jury on multiple contempt charges can be defeated by the subsequent actions of the trial judge or the reviewing court in reducing or modifying the sentence so that the total sentence imposed does not exceed six months' imprisonment, thereby converting the offense into a "petty offense," within the meaning of the trial by jury guarantee.

When the trial judge ordered the peace officers to "take him away," the petitioner faced a sentence of 54 months' imprisonment, including one year on each of two counts. As the trial judge subsequently realized, he could not, without the intervention of a jury, impose a sentence of one year's imprisonment on those counts, *Baldwin* v. *New York*, 399 U. S. 66 (1970), and as he specifically stated, in order that the petitioner's Sixth Amendment right to trial by jury not come into play, he reduced the sentences on those counts to six months' each. Assuming that the sentences were to run consecutively, the petitioner then faced 41 months' imprisonment, and he argued on his appeal that such a sentence could not be imposed without the intervention of a jury.

The trial judge attempted to meet this argument in his brief by arguing that so long as the sentence on no one count exceeded six months (which he accomplished by reducing the sentences on counts 8 and 9) there was no right to trial by jury, irrespective of the aggregate amount of the sentence. This view was rejected in

United States v. *Seale,* 461 F. 2d 345 (7th Cir. 1972), where as here, sentence was not imposed until after the trial, and the Kentucky Court of Appeals has not only indicated agreement with the approach in *Seale,* but has specifically held that there cannot be incarceration for more than six months for contempt of court "except upon the unanimous verdict of a jury under instructions including the reasonable doubt protection, as in comparable criminal cases." *Local No. 1667, United Auto Workers* v. *Kawneer Company, Inc.,* Ky., 490 S. W. 2d 747 (1973). In order to bring the petitioner's case within the "six month rule," the Court of Appeals, absolutely gratuitously, directed that the sentences be served concurrently rather than consecutively,[2] and then held that the petitioner was not entitled to a jury trial on the charges.

This Court should grant certiorari to make it clear what criteria apply in determining whether a particular contempt proceeding constitutes a "petty" or "serious" offense within the meaning of the trial by jury

[2]In so doing the Court disregarded either its prior holding to the effect that if the judgment does not provide otherwise, multiple sentences are construed to run consecutively, *Beasley* v. *Wingo,* Ky., 432 S. W. 2d 413 (1968), or its prior holding to the effect that whether sentences are to run consecutively or concurrently is within the exclusive discretion of the trial judge. *McBride* v. *Commonwealth,* Ky., 432 S. W. 2d 410 (1968). It is also interesting to note that while the trial judge originally argued that he had the power to impose sentences aggregating 41 months' imprisonment so long as the sentence on no one count exceeded six months (Brief for Respondent-Appellee, pp. 2, 17), in response to the petitioner's Petition for Rehearing, he argued that he had intended to limit the total sentence to six months in the corrected judgment. (Response to Petition for Rehearing, p. 1). What has occurred here is quite obvious—the sentences were ordered to run concurrently so as to defeat the petitioner's claim to a jury trial.

guarantee, and whether the right to trial by jury can be defeated by the *subsequent* actions of the trial judge or reviewing court in modifying the total sentence to a maximum of six months' imprisonment. This Court has stated that in determining whether a particular offense is "petty," it has sought "objective indications of the seriousness with which society regards the offense." *Frank* v. *United States,* 395 U. S. 147, 148 (1969). But there are problems in applying this test to criminal contempt because of the great range of conduct that may be considered "contemptuous" and because of the general absence of maximum penalties for the offense. For this reason, this Court has held that in prosecutions for criminal contempt where no maximum penalty is authorized, "The severity of the penalty actually imposed is the best indication of the seriousness of the particular offense," *Frank* v. *United States, supra,* 395 U. S. at 149, and in light of *Baldwin* v. *New York, supra,* where the penalty actually imposed exceeds six months' imprisonment, there is the right to a jury trial. But it has not held that the severity of the penalty actually imposed is the *only* indication of the seriousness of the offense.

The Kentucky legislature has clearly indicated its view that contempt should be regarded as a serious offense in that State by limiting the punishment that can be imposed for contempt without the intervention of a jury to a maximum fine of $30 and imprisonment for 30 hours. Kentucky Revised Statutes 436.020. In the case at bar the petitioner relied on this statute to contend that he was entitled to a jury trial under state

law as well as under the Sixth Amendment. The Court of Appeals, however, held that the statute was invalid under the State Constitution, and that the power of the trial judge to impose punishment for contempt was unlimited. 494 S. W. 2d at 745. See also *Arnett* v. *Meade,* Ky., 462 S. W. 2d 940 (1971).

The legislative determination that contempt is a serious offense, albeit that it is one contained in a statute declared invalid under state law, certainly is an "objective indication" of the seriousness with which the offense is regarded in Kentucky. More importantly, the allegedly contemptuous conduct with which the petitioner was charged was deemed serious enough by the trial judge so that he originally imposed a one year prison term on each of two counts and imposed consecutive sentences on all of the counts aggregating 54 months' imprisonment. The seriousness with which he viewed the purported offense is further evidenced by his extreme statements from the bench at the time he sentenced the petitioner, his refusal to admit the petitioner to bail pending appeal or even to hold a bail hearing, and his entry of an invalid order prohibiting the petitioner from practicing in the Second Division. The Court of Appeals, while holding that the petitioner had only been convicted of a "petty" offense within the meaning of the trial by jury guarantee, said of the allegedly contemptuous conduct that it was "such as to place on trial the entire judicial system of the Commonwealth and those judges sworn to uphold its Constitution and laws and thereby assure defendants a fair, orderly and speedy trial." 494 S. W. 2d

at 741. The petitioner, of course, would most vigorously dispute this characterization of his conduct, and contend that he did nothing more than zealously defend the rights of his client charged with a capital offense, but the fact that his conduct was so characterized by the Court of Appeals, coupled with the severity of the sentence originally imposed, certainly supplies the "objective criteria reflecting the seriousness of the offense," *Frank* v. *United States, supra,* within the meaning of the trial by jury guarantee.

What has happened here is that the Court of Appeals has read this Court's decisions in *Frank* v. *United States* and *Baldwin* v. *New York, supra,* as setting forth a "six month rule" and holding that whenever the sentence actually imposed is less than six months, *regardless of other "objective criteria reflecting the seriousness of the offense",* there is no right to a jury trial. This Court did not so hold in those cases, and certiorari should be granted to determine whether "objective criteria reflecting the seriousness of the offense" can be disregarded where the sentence actually imposed is less than six months. Certiorari should also be granted to determine whether the right to trial by jury can be defeated by the subsequent modification of the sentence on the part of the trial judge or reviewing court to bring it within the purported "six month rule."[3] Here the allegedly contemptuous conduct was deemed seri-

[3]Compare *Mitchell* v. *Fiore,* 470 F. 2d 1149 (3rd Cir. 1972), where the trial judge viewed the contempt as "petty" and imposed a $10,000 fine for "civil contempt." The appellate court held that the imposition of the fine was punitive, so that the contemnor would have been entitled to a jury trial if it had been allowed to stand, but instead vacated the fine.

ous enough by the trial judge to warrant the imposition of sentences of one year's imprisonment on each of two counts and consecutive sentences aggregating 54 month's imprisonment. He reduced the one year sentences to six month's each for the express purpose of defeating the petitioner's right to a jury trial, and the Court of Appeals ruled that the sentences had to run concurrently, again for the purpose of denying the petitioner trial before a jury on the charges. Certiorari should be granted to determine whether the Sixth Amendment's trial by jury guarantee can be dealt with in so cavalier a manner.

This case presents substantial questions as to the criteria for determining what constitutes "serious" contempt within the meaning of the trial by jury guarantee, and as to whether the Sixth Amendment's protection can be lost by subsequent modification of the sentence originally imposed to bring it within a purported "six month rule." Certiorari should be granted by this Court to resolve these questions.

II.

This Court should grant certiorari to determine the substantial question of whether due process requires that when a trial judge proceeds summarily to punish for alleged contempts committed in his presence, the contemnor must be given some oportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed.

This Court has not, because it has not been presented with the precise question, specifically held whether due process requires that when a trial judge proceeds summarily to punish for alleged contempts committed in his presence, the contemnor must be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed. The same question may exist in a non-Constitutional context with respect to summary punishment of contempts under Federal Rules of Criminal Procedure 42(a), since it is not specifically provided in the rules that the alleged contemnor is entitled to be heard. See *United States* v. *Galante,* 298 F. 2d 72 (2d Cir. 1962); C. Wright, *Federal Practice and Procedure* § 708 (1969).

The likely reason that this precise question has not been presented heretofore is that in most instances it may be expected that the judge will give the person charged some opportunity to be heard in defense or mitigation. As this Court stated in *Groppi* v. *Leslie,* 404 U. S. 496, 504 (1972):

> "Where a courts acts immediately to punish for contemptuous conduct committed under its eye,

> the contemnor is present, of course. There is then no question of identity, nor is a hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations. *Moreover, in such a situation, the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution.*" (Emphasis added.)

In *Sacher* v. *United States*, 343 U. S. 1 (1952), perhaps the most "extreme" holding with respect to a court's power to punish summarily for contempt, the contemnors were given an opportunity to speak in their defense, and as this Court noted, "Although he imposed sentence before hearing the contemnors, the trial judge would, no doubt have modified his action had their statements been persuasive." *Groppi* v. *Leslie, supra*, 404 U. S. at 506, n. 11. See also *Levine* v. *United States*, 362 U. S. 610, 613-614 (1960); *Brown* v. *United States*, 359 U. S. 41, 52 (1959). Because the opportunity to speak in the nature of a right of allocution is generally given and because the exercise of the summary contempt power has been strictly limited, see *e.g., Johnson* v. *Mississippi*, 403 U. S. 212 (1971), it has not heretofore been necessary for this Court to consider the precise question of whether some opportunity to be heard in defense or mitigation in summary contempt proceedings is required by due process of law. In the Kentucky Court of Appeals the petitioner proceeded on the assumption that this was required, since reasonable notice of a charge and the opportunity to be heard in defense before punishment is imposed are "basic in

our system of jurisprudence." *In re Oliver*, 333 U. S. 257, 273 (1948). However, the Court of Appeals refused to accept this assumption, and rejected the petitioner's argument that his due process rights had been violated in this respect. It merely noted that the petitioner was informed by the trial judge that he was in contempt immediately following the charged act so that, "The contempt citations and the sentences coming at the end of the trial were not and could not have been a surprise," 494 S. W. 2d at 741-2. The imposition of a contempt sentence without offering the contemnor the opportunity to be heard in *United States* v. *Galante, supra,* and the language in some state court decisions indicating that there is no right to be heard in case of summary contempt, see *e.g., People* v. *Carr,* 3 Ill. App. 3d 227, 278 N. E. 2d 839, 840 (1971), lend further impetus to the petitioner's position that it is necessary for this Court to precisely hold that there must be some opportunity to be heard in defense or mitigation before punishment for criminal contempt may be summarily imposed.

At no time was the petitioner informed of the charges against him or given any meaningful opportunity to be heard in defense or mitigation. At various times during the trial the trial judge told the petitioner that he was in contempt, but he did not specify what the charge was nor impose any punishment at the time. On counts 2 through 5 he did permit some discussion about the allegedly contemptuous conduct, but it was intertwined with a discussion of the substantive issues. On counts 6 and 9 the trial judge simply informed the

petitioner at the bench that he was in contempt. He allowed the petitioner to make a response for the record on count 7, but then directed the court reporter not to put it in the record, and specifically refused to permit the petitioner to make a response for the record on count 8. At the end of the trial he summoned the petitioner before the bench, attacked his integrity and professional qualifications, and without giving him any opportunity to speak a word in his defense, reeled off sentences on nine counts of contempt (later changed to eight), aggregating 54 months' imprisonment. When the petitioner pleaded with the trial judge for the opportunity to speak, the trial judge threatened to gag him, and after imposing sentence, directed to bailiff to "take him away." It should also be emphasized that the trial judge never specified what the charges were until some *five months later* when the petitioner had appealed his case and the trial judge obtained permission to file a "corrected judgment."

It is precisely because the power to punish summarily for contempt can be exercised in the way it was here, and still be sustained by the highest court of a state, that it is necessary for this Court to make it clear that some rudimentary form of due process applies to summary contempt proceedings. There is no contention that the opportunity to be heard in response to a charge of direct contempt committed in the court's presence is the same as the full-scale hearing required when the alleged contempt is committed outside of the Court's presence. *C.f. Johnson* v. *Mississippi, supra;* Federal Rules of Criminal Procedure 42(b). What is

contended is that the power to punish summarily for allegedly contemptuous conduct committed in the presence of the court does not include the power to deny the contemnor any meaningful opportunity to be heard at all in defense or mitigation. The contemnor, it is submitted, is entitled to be informed of the precise charge of contempt that is being made against him, and to present his defense to the charge and matters in mitigation. He is also entitled to a ruling on the charge and to be informed of the punishment. If a person charged with a minor offense were treated in the manner that the petitioner was treated here, there would be no doubt but that there had been a flagrant denial of due process of law. An attorney, who may suffer adverse professional consequences as well as imprisonment from a finding of contempt, surely should be entitled to the same due process, and all semblance of due process should not be disregarded merely because the trial judge is acting summarily.

This Court should grant certiorari to make it clear whether or not some rudimentary form of due process is required when a trial judge acts summarily to punish for contempt.

III.

The holding of the Court below that the trial judge could impartially sit in judgment on the multiple contempt charges against the petitioner is clearly inconsistent with the decisions of this Court on the question of judicial disqualification in contempt proceedings.

Although the trial judge cited the petitioner for contempt at various times during the trial, he did not act to impose punishment until after the trial had been completed. Thus, there was no question as to the necessity of "instant punishment," and as the Court of Appeals recognized, if the trial judge could not impartially sit in judgment on the contempt charges, the petitioner's conviction would have had to have been reversed. *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971). However, the Court of Appeals held that the trial judge was not disqualified, and that holding, it is submitted, is patently inconsistent with the decisions of this Court on the question of judicial disqualification in contempt proceedings.

It is well-settled that the trial judge is disqualified to sit in contempt proceedings where he has become personally *embroiled* in controversy with the alleged contemnor, such as where he is an "activist" seeking combat, *Offutt* v. *United States,* 348 U. S. 11 (1954), where he has been the victim of a "personal attack," *Mayberry* v. *Pennsylvania, supra,* where for any reason he may be biased against the alleged contemnor, *Johnson* v. *Mississippi,* 403 U. S. 212 (1971), or where he has adopted an adversary posture with respect to the alleged contemnor. *United States* v. *Meyer,* 462

F. 2d 827 (D.C. Cir. 1972). In the circumstances of this case, for the Kentucky Court of Appeals to hold that the trial judge was not disqualified from sitting in judgment on the contempt charges against the petitioner evidences a complete disregard of well-settled principles of law that have been established by this Court.

The animus and hostility of the trial judge toward the petitioner is amply demonstrated by his conduct and statements throughout the trial and thereafter. To say the least, the interchanges between court and counsel during the trial "were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor." *Offutt* v. *United States, supra,* 348 U. S. at 12. From the beginning the trial judge cast aspersions on the petitioner's character and ability, and accused him of improper motives. While the voir dire was going on, the trial judge stated that he was going to take it over and said to the petitioner, "I think you're putting on a show. That's my opinion" (Tr. 348). During a discussion in chambers about wrangling between attorneys, he stated in reference to the petitioner: ". . . you all were talking and I can't blame the guy too much for that, but on the other hand, he is getting away from the questions and knowing him, if you give him an inch, he'll take a mile. I might as well sit on him right now" (Tr. 546). In another interchange the trial judge again insisted on indulging in personalities:

"Mr. Taylor: Does Your Honor understand that my purpose is to defend my case?

The Court: I think that's probably what you're here for, I'm not sure" (Tr. 1364).

And in still another interchange when the petitioner attempted to explain his basis for making an objection:

"Mr. Taylor: The objection is that he uses the word 'also' as inferring that he's got these great confessions.

The Court: Don't go through all those configurations and put on an act" (Tr. 1860).

The trial judge also accused the petitioner of "trying to make every case a political trial," and in a totally unprecedented move, directed that the petitioner prepare a list of every witness he planned to call within fifteen minutes and summarily ruled on whether those witneesses would be permitted to testify (Tr. 1908-1910).

The effect of the trial judge's hostility toward the petitioner on his imposition of the sentences for contempt is graphically illustrated by the following interchange:

"Mr. Taylor. Thank you. Now, may I say, additionally, I have serious doubts as to the legal correctness of the order and since we have, I have, I don't know, five months of my life wrapped up in this case, and maybe more than that—

The Court: (interrupting) Before it's over, you might have a lot more than that.

Mr. Taylor: Would the Court care to amplify on the meaning of that?

The Court: The Court just made a statement.

Mr. Taylor: Sir, I didn't—

The Court: (interrupting) The Court just made a statement.

Mr. Taylor: Yes, sir, and I asked if the Court would care to expand on the meaning of—

* * * * * * *

The Court: (interrupting) I don't have to explain my comments.

Mr. Taylor: I see. I'm requesting that you reconsider and that you adjourn until tomorrow and give me an opportunity to get before our reviewing Court for a Writ of Mandamus—

The Court: (interrupting) Overruled.

Mr. Taylor: I wonder if I might finish my sentence before you overrule—

The Court: (interrupting) It's overruled" (Tr. 1957-8).

It cannot be doubted that in the case at bar the contempts charged were "entangled with the judge's personal feeling against the lawyer." *Offutt* v. *United States, supra,* 348 U. S. at 14. Marked personal feelings were present, at least on the part of the trial judge, and as the above examples indicate, he clearly was an "activist seeking combat." (In its Opinion, the Kentucky Court of Appeals characterized petitioner's conduct as being "polite.")

Moreover, while it is indeed true, as the Court of Appeals found, that the petitioner did not launch a personal attack against the trial judge, the fact remains that the trial judge perceived himself as the victim of such an attack. This appears most clearly

in the contempt citations themselves and in his "introductory remarks." The Court of Appeals was also incorrect in saying that the petitioner did not attack the trial judge's "integrity or ability." Quite to the contrary, in attempting to defend his client to the best of his ability, it was painfully necessary for the petitioner to accuse the trial judge of denying his client's right to a public trial (Tr. 1895), and of acting on the basis of rancor in ruling that race was not an issue in the case (Tr. 1968). He also sought a delay in the case so that he could seek a writ of mandamus from the Court of Appeals to prevent the trial judge from proceeding further in the case (Tr. 1957). Clearly, the petitioner charged that the trial judge was acting unfairly, which is certainly an attack, albeit a necessary one, on his "integrity or ability." A trial judge may be disqualified to proceed against an alleged contemnor when his integrity or ability has been called into question, such as where a party or attorney has charged the judge with bias or unfairness, *Holt* v. *Virginia,* 381 U. S. 131 (1965); *United States* v. *Meyer, supra; In re Dellinger,* 461 F. 2d 389 (7th Cir. 1972). That charge was made here, and in such circumstances, the case of *Ungar* v. *Sarafite,* 376 U. S. 575 (1964), relied on by the Court of Appeals to hold that the trial judge was not disqualified from sitting in judgment on contempt charges against the petitioner, is clearly inapplicable. See the discussion in *United States* v. *Meyer, supra,* 462 F. 2d at 845.

Finally, the trial judge is disqualified from sitting in judgment on contempt charges, where he has

"adopted an adversary posture with respect to the alleged contemnor." *United States* v. *Meyer, supra,* 462 F. 2d at 862. Whatever else may be said about this case, it cannot be denied that the trial judge adopted an adversary posture with respect to the petitioner. In the view of the Court of Appeals, the trial judge "appeared to be continuously on the defensive in his effort to contain Taylor to the point where the defendants would be assured a fair trial." 494 S. W. 2d at 742. While the petitioner would dispute this characterization of what the trial judge was doing, it is clear that he and the trial judge were perceived by the Court of Appeals as being in an adversary posture, and this being so, the trial judge was certainly disqualified from sitting in judgment on the contempt charges against him.

If "actions speak louder than words," the bias of the trial judge toward the petitioner, and his obvious lack of impartiality, is manifestly demonstrated by his unprecedented order that the petitioner produce a list of all the defense witnesses within fifteen minutes, and his summarily deciding in advance that many of them would not be permitted to testify. Consider the following:

> "The Court: What's Hyde got to do with this?
> Mr. Taylor: Quite a bit.
> The Court: He just was at that time Chief of Police?
> Mr. Taylor: He was in charge of the whole thing.
> The Court: Strike him" (Tr. 1989).

Further:

> "The Court: I am not going to hold up these proceedings waiting for a witness. If he's here, he can testify, if he isn't, *we'll skip over him*" (Tr. 2036-2037). (Emphasis added.)

The Court's bias is further manifested by his invalid order prohibiting the petitioner from the further practice of law in the Second Division of Jefferson Circuit Court. It is still further manifested by his refusal to admit the petitioner to bail, or to even hold a bail hearing (at which the petitioner was not permitted to be present) until ordered to do so by the Court of Appeals.

But above all else there is the behavior of the trial judge at the conclusion of the trial when he finally adjudged the petitioner guilty of the contempts charged and imposed consecutive sentences aggregating four and one-half years' imprisonment. The trial judge not only accused the petitioner of improper motives, not only criticized the bar association for not having disciplined the petitioner "years ago," not only said that he wanted the members of the jury and the law students "of the community" to hear his remarks, but refused to allow the petitioner to speak a word in his defense, threatened to gag him if he persisted in trying to do so, and directed the bailiff to "take him away." The utter absence of any semblance of impartiality is reflected in the statement he made when he began to impose sentence, "I *have* you on nine counts." (Emphasis added.) The Court of Appeals referred to the

trial judge's remarks as "inappropriate," and conceded that they were "somewhat similar to the statements made in *Offutt.*" 494 S. W. 2d at 744. But then went on to say that they did not clearly demonstrate bias. If those remarks and the judge's behavior at the time he was sentencing the petitioner to four and one-half years' imprisonment do not demontrate bias, it may be asked what does. The Court went on to say that "in light of the obvious guilt of Taylor these remarks were not such a showing of bias as to require the disqualification of the judge." 494 S. W. 2d at 745. It is difficult to see what the supposed "obvious guilt" of the petitioner has to do with the bias of the judge. If the judge has demonstrated his bias, as he clearly did here, he is not capable of maintaining "that calm detachment necessary for fair adjudication," as required by *Mayberry* v. *Pennsylvania, supra,* 400 U. S. at 465. A clearer case of guilt than was present in *Mayberry* cannot be imagined, 400 U. S. at 462-463, but the guilt of the contemnor had nothing to do with the ability of the judge to impartially determine guilt, and, more importantly, to impose sentence.

Trial before an unbiased judge is essential to due process of law, *Bloom* v. *Illinois,* 391 U. S. 194, 205 (1968) and the statements and behavior of the trial judge in the case at bar demonstrate beyond peradventure the bias and hostility that he bore toward the petitioner. For the Court of Appeals to hold that in the circumstances of this case the trial judge was not disqualified from sitting in judgment on the contempt charges against the petitioner is to disregard

completely the applicable principles of law established by this Court. The flagrant denial of due process that has thus been sanctioned calls for the granting of certiorari by this Court and the reversal of the petitioner's conviction.

IV.

This Court should grant certiorari to determine the substantial question of what conduct on the part of an attorney engaged in zealous representation of his client can be made punishable as criminal contempt on the ground that it has created a material obstruction to the administration of justice.

This Court has held that an attorney is entitled to much latitude in vigorously conducting a client's cause, and that a lawyer cannot be convicted for contempt of court unless he "in some way creates an obstruction which blocks the trial judge in the performance of his judicial duty." *In re McConnell,* 370 U. S. 230, 236 (1962). It has also held that mere "disrepect" toward the person of the trial judge cannot constitute criminal contempt. *In re Little,* 404 U. S. 553 (1972). The protection afforded an attorney in this respect must be related to the Sixth Amendment's guarantee of the effective assistance of counsel, and is as much for the benefit of the client as for the attorney. It has been said that in the defense of his client an attorney has the right to be "persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious when acting on his client's behalf." *In re Dellinger,* 461 F. 2d 389, 400 (7th Cir. 1972). But an attorney

who conducts a vigorous defense in this manner may well be perceived as "contemptous" by trial judges who are insecure in their authority, who are not "men of fortitude, able to thrive in a hardy climate," *Craig* v. *Harney,* 331 U. S. 367, 376 (1948), and who are unable to avoid confusing "offenses to their sensibilities with obstruction to the administration of justice." *Brown* v. *United States,* 356 U. S. 148, 153 (1958). In order for the Sixth Amendment's guarantee of the effective assistance of counsel to be truly meaningful, this Court must make clear precisely what conduct on the part of an attorney engaged in the zealous representation of his client can rise to the level of a "material obstruction to the administration of justice" and subject him to punishment for criminal contempt.

The case at bar is a particularly appropriate one for this Court to grant review and consider this question. Most of the charges against the petitioner involve an alleged lack of "respect" shown to the court, and as can be seen from the specification of the charges themselves, they raise most strikingly the issue of when a trial judge has "confused offenses to his sensibilities with obstruction to the administration of justice." *Brown* v. *United States, supra.* The Court of Appeals likewise was obsessed with the notion of "respect," and in its opinion stated that even the brief that was filed on behalf of the petitioner "in itself demonstrates something less than complete and total respect for the judicial system of this Commonwealth." 494 S. W. 2d at 741. The Court's obsession with "respect" caused it to ignore completely the crucial question of "ma-

terial obstruction to the administration of justice," *In re McConnell, supra,* and it appears to be holding that mere "disrespect" toward the person of the trial judge can constitute criminal contempt, in clear disregard of this Court's decision in *In re Little, supra.* The other charges against the petitioner essentially involved a conflict between the petitioner and the trial judge over whether certain matters were admissible into evidence and the petitioner's efforts to redirect a line of questioning so as to make the evidence sought to be elicited admissible. There was no showing of persistent disregard of the court's rulings, of insistence on obedience by the court and defiance by the petitioner, or of any conduct that "in some way creates an obstruction which blocks the trial judge in the performance of his judicial duty." *In re McConnell, supra.*

The Kentucky Court of Appeals just totally refused to discuss the specific charges of contempt leveled against the petitioner, or to demonstrate why the conduct alleged in those charges constituted an "obstruction to the administration of justice." Its Opinion demonstrated a total hiatus in this regard. Instead it engaged in completely unwarranted assumptions concerning the motivations of the petitioner, and accused him of having a "plan" to disrupt the trial. But at no point did it refer to any evidence in the record that would support its assumptions concerning the petitioner's motivation or his purported "plan."* The

*It belies common sense that Petitioner, serving without pay in a vastly unpopular case, which had already drug on for two weeks before a Judge of this type, would want to repeat the process, in future, for any reason whatsoever.

Kentucky Court of Appeals has clearly acted improperly, and has ignored Constitutional criteria, in upholding the conviction of the petitioner.

It is respectfully submitted that if the conduct for which the petitioner has been convicted can Constitutionally be made punishable as criminal contempt, the power of a trial judge to inhibit an attorney in the vigorous representation of his client by the threat of contempt citations will be virtually unlimited. This will then effect the total emasculation of the criminal defense Bar, and mean an end to zealous advocacy in the United States. This case presents the Court with the opportunity to define precisely what conduct on the part of an attorney engaged in the zealous representation of his client can be made punishable as criminal contempt, consistent with the Sixth Amendment's guarantee of the effective assistance of counsel and the Fourteenth Amendment's guarantee of due process of law, and for this reason certiorari should be granted.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should be granted to review the judgment of the Court of Appeals of Kentucky.

Respectfully submitted,

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

DORIS PETERSON
MORTON STAVIS
Center for Constitutional Rights
853 Broadway
New York, New York 10003

Attorneys for Petitioner

APPENDIX

OPINION OF THE COURT OF APPEALS OF KENTUCKY
March 23, 1973
494 S. W. 2d 739

CATINNA, Commissioner.

Daniel T. Taylor, III, appeals from a judgment and order of the Jefferson Circuit Court, Criminal Branch, Second Division, finding him guilty upon eight charges of contempt and committing him to the City of Louisville Jail for a total of three years and five months. He further appeals from an order of the same court prohibiting him from the further practice of law in that particular court because he had been theretofore found guilty of contempt of court.

The charges of contempt against Taylor result from his conduct in the defense of Narvel Tinsley. Narvel Tinsley and his brother, Michael Tinsley, were jointly indicted and charged with the murder of two police officers. The Tinsleys were black men while the police officers were white. The murders created some considerable sensation in Louisville, and feelings in the different communities were very pronounced. The news media tended to publicize each and every phase of the events surrounding the murders, and there was some apparent cooperation on the part of the authorities, as there is mention made of live television coverage of the site where the murders were said to have been committed. A news conference, with television coverage, announced the arrest of the Tinsleys. Later Narvel Tinsley escaped jail, and again newspaper coverage was overly abundant. It was in this situation that the joint trial of Narvel and Michael Tinsley was finally commenced on October 18, 1971.

Daniel Taylor, III, represented Narvel Tinsley while Michael Tinsley was represented by Attorneys Fleming, McCall, and Scott.

The trial lasted from October 18 through October 29, 1971, with Sunday excepted, and it was in the course of this trial that Taylor committed the offenses which were considered contemptuous in nature by the court. The particular acts of contempt as specified by the court in a "Corrected Judgment and Certificate of Contemptuous Action in the Presence of the Trial Court" were as follows:

"Contempt 1. Mr. Taylor, in questioning a prospective juror, on the second day of Voir Dire, repeatedly ignored the Court's order not to continue a certain line of questioning and to ask his questions to the jury as a whole. He evidenced utter disrespect for prospective jurors.

"Contempt 2. The Court sustained the Commonwealth objection on the use of a prior statement to cross examine Officer Hogan and not to go into the escape of Narvel Tinsley. Mr. Taylor repeatedly and completely ignored the Court's ruling.

"Contempt 3. During the playing of a tape recording of the voice of witness David White, Mr. Taylor wrote on a blackboard. After the playing of the tape it was ordered that the blackboard be removed from the Court and Mr. Taylor was advised by the Court that he could use it in his final summation to the jury. Mr. Taylor was disrespectful to the Court by his tone of voice and manner when he replied, "I'll certainly keep that in mind, your Honor.'

"Contempt 4. During cross-examination of Narvel Tinsley, by Mr. Schroering, Mr. Taylor interrupted and moved for a recess, was overruled by the Court, and then became most disrespectful to the Court and refused to take his seat at counsel's table as ordered.

"Contempt 5. Complete and utter disrespect by Mr. Taylor in the questioning of Mr. Irvin Foley, an

attorney and Legal Advisor to the Louisville Police Department when he continually disobeyed the Court's ruling regarding a press conference which the Court had ruled on unadmissible (sic). Mr. Taylor accused the Court of disallowing admittance of black persons in the Courtroom during the examination of this witness and made a statement in the presence of the jury inferring that only white police officers could enter the courtroom. It has always been the Rule of the Court that there will be no interruption during the examination of a witness or during closing arguments by people coming and going into and from the Courtroom, which rule was known to Mr. Taylor.

"Contempt 6. The witness Jesse Taylor, a Louisville Police Officer, read a statement by witness, David White. A Ruling was made by the Court that the statement spoke for itself, had been introduced in evidence and could not be commented on by Officer Taylor, who merely took the statement. Mr. Taylor continued to disregard the Court's order and ruling by continually reading parts of the statement out of context.

"Contempt 7. Mr. Taylor in examining Mr. Norbert Brown, again referred to a press conference that the Court had previously ordered him not to go into. He also waved his arms at the witness in a derogatory manner indicating the witness was not truthful and showing utter contempt of the Court's ruling.

"Contempt 8. The Court directed Mr. Taylor to call his next witness. He called Lt. Garrett, Louisville Police Department. After this witness was sworn and took the stand, a deputy sheriff advised the Court that Mr. Taylor's aide was not searched, as everyone else had been upon entering the Courtroom. Mr. Taylor ordered the deputy to search his aide. The Court or-

dered Mr. Taylor to begin his examination, which he refused to do until he was cited for contempt in the Court's chamber.

"Contempt 9. Mr. Taylor repeatedly asked the same question of witness Floyd Miller that the Court had held improper. He was also disrespectful in his tone of voice when referring to a certain police officer as 'this nice police officer.' "

We have examined the entire record of the Tinsley trial, and it becomes immediately apparent that even before the trial had "gotten off the ground, so to speak," Taylor had embarked upon a plan or program designed to disrupt the trial and by any means posible cause the trial court to commit trial errors which might form the basis of an appeal. His actions were such as to clearly illustrate that they were deliberate, delaying, or planned disruptive tactics which did in fact create such an atmosphere in the court that he, if permitted to continue, would have appeared to be the star performer in the center ring of a three-ring circus. He constantly harassed the court by innumerable objections, statements, and requests for conferences in chambers, and, in truth, the record indicates that a great percentage of the trial time was consumed by the court and counsel attending speeches made by Taylor in the court's chambers.

As the trial progressed, there was a constant refusal on the part of Taylor to desist in his arguments, some in the presence of the jury and some at the bench. He refused upon occasions to maintain his seat so that the orderly processes of the court were available to the defendants. He continuously disregarded the court's orders and directions concerning the examination of jurors or witnesses and persisted in repetitious questioning and argument with both jurors and witnesses. Taylor launched a long tirade seeking to have the court remove opaque screens that had been

placed over the windows and doors so as to lend some degree of privacy to the proceedings and protect the participants in the trial from the disconcerting demonstrations which were being conducted in and around the building. Taylor claimed that by the screeing of the windows and doors his client was not receiving a public trial. Later, he made a monumental production of the fact that the court was refusing to admit spectators in crowds, claiming that by reason of this policy his client was not receiving a public trial. Again, the clearing of the back two rows of benches in the courtroom following laughter, noise, and other disruptive practices by the spectators was claimed by Taylor to be prejudicial to his client's receiving a fair trial.

There is no necessity of detailing the innumerable acts of Taylor which clearly reflected his contempt for the court as well as the judicial system of this Commonwealth. His actions were such as to place on trial the entire judicial system of the Commonwealth and those judges sworn to uphold its Constitution and laws and thereby assure defendants, a fair, orderly, and speedy trial.

Taylor was overbearing, contemptuous, and obnoxiously persistent in his questions and objections, and his misconduct was such that those attorneys representing Michael Tinsley, claiming that his antics prejudiced the rights of their client, were continually objecting to his tactics and moving the court that a severance be granted. The incidents necessitating objections on the part of Michael Tinsley's attorneys were so persistent and so constant that rather than consume the time of the court in a constant repetition of the rather involved objection and motion, the parties got to the place of calling it "Objection No. 1." We find all through the record this Objection No. 1 made on behalf of Michael Tinsley.

In the light of the entire record this court can only conclude that Daniel Taylor was guilty of each and every con-

tempt as charged by the court, and if the court had so desired there could have been numerous other charges assessed in the course of the trial. In spite of Taylor's contemptuous conduct throughout the trial, we do not find at any point in the record an occasion where Taylor made any personal attack upon the judge, his integrity, or ability. On the contrary, Taylor was polite to the point of almost being condescending. At no time was his conduct of such a nature as to create a personal controversy between him and the court.

Throughout his brief, Taylor complains continuously of the conduct of the judge. He is identified as "an activist seeking combat" and charged with an actual intent on his part to purposely "bait" Taylor beyond the endurance of any lawyer to accept such vilification and abuse. The judge is charged with exercising an "uncontrollable animus" toward Taylor during the entire proceedings and with fighting him on a personal basis because he was attorney for Narvel Tinsley. Taylor's brief says that such charges are grave, and this court agrees with him to the extent of saying that the brief in itself demonstrates something less than complete and total respect for the judicial system of this Commonwealth. Our examination of the record fails to substantiate in the least any of the charges of misconduct on the part of the court that were discussed and complained about in Taylor's brief. In fact, we reach a contrary conclusion, for it seems to us that the court "leaned over backwards" in an effort to assure Narvel Tinsley a fair trial in spite of the misconduct of his attorney.

The contempt citations and the sentences coming at the end of the trial were not and could not have been a surprise to Taylor, because upon each occasion and immediately following the charged act of contempt the court informed Taylor that he was at that time in contempt of court. All of these acts were committed in open court and made known

to Taylor at the time of their commission and, therefore, he cannot now complain that he was unaware of the nature of the charged contempt. Cf. Cooke v. United States, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925). The conduct of the judge throughout the trial was motivated by his efforts to maintain order in his courtroom and to see that the trial was properly conducted. The court was never the "activist seeking combat," but rather he appeared to be continuously on the defensive in his effort to contain Taylor to the point where the defendants would be assured a fair trial.

Upon completion of the trial, the case was submitted to the jury which returned verdicts finding each of the Tinsleys guilty and fixing their punishment at death. After the verdicts had been returned, but before the jury was discharged and while it was seated in the jury box, the following proceeding took place:

> "The Court: Mr. Taylor, the Court has something to take up with you, sir, at this time.
>
> Mr. Taylor: Well, I'll be right here, Judge.
>
> The Court: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.
>
> For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years on this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean that it's based upon planned confusion.
>
> Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule—

Mr. Taylor: (Interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself."

The court thereupon sentenced Taylor on nine counts of contempt aggregating in all four and one-half years. However, this court permitted the trial judge to file a corrected judgment by which Taylor was sentenced upon eight charges of contempt for a total of three years and five months in jail.

The right of the courts of this Commonwealth to maintain order by punishment for contempt has been a part of our law for a great number of years. In 1882 the right to punish for contempt without the intervention of a jury was recognized as fully established by the rules of the common law and therefore a part of the law of this state. Arnold v. Commonwealth, 80 Ky. 300.

A short time later contempt was defined in these words:

"Civil contempts are those quasi contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court; while criminal contempts are all acts in disrespect of the court or its process, which obstruct the administration of justice, or tend to bring the court into disrepute." Wages v. Commonwealth, 13 K.L.R. 925 (1892).

An even more recent definition of contempt and one which fits Taylor like a glove is found in United States v. Seale, 7th Cir., 461 F. 2d 345 (1972), at page 371, where the court said:

> "On the positive side of the obstruction question, failure to heed the directive of the court to desist from arguing, to sit down, or to remain quiet may indeed constitute an actual material obstruction to the administration of justice. The unmistakable implication of In re McConnell, 370 U. S. 230, 235, 236, 82 S. Ct. 1288, 8 L. Ed. 2d 434, is that defiance of the court's order to cease questioning would have actually obstructed the proceedings. As governor of the trial, the trial judge must have the authority necessary to ensure the orderly and expeditious progress of the proceedings. His directives in exercise of this authority must be obeyed; otherwise the clear result would be courtroom chaos. Wholly arbitrary limits on argument will, if prejudicial, merit reversal of the substantive case, but that hardly can excuse open defiance of the court's commands. * * * We do not say that automaton-like reflexive obedience to the court's order is necessary to avoid a contempt citation. The law does not expect unhuman (sic) responsiveness. A certain amount of leeway must be allowed. But where the directive is clear, the judge's insistence on obedience is not undercut by his further rejoinder, and the party directed understands what is being asked of him, he must obey. * * *."

Taylor was so conclusively guilty of contempt, committed in open court in the presence of the judge, that under the present laws of this Commonwealth, we would have no difficulty in affirming the judgment of the trial court.

However, Taylor's claim that his rights under the 6th and 14th Amendments to the Constitution of the United

States have been violated requires that we re-examine the action of the trial judge upon these points. Taylor claims that the trial judge was so personally involved in controversy with him that he could not impartially sit in judgment on the contempt charge. The Supreme Court has held that a trial judge is disqualified to act on a contempt charge in situations where he has become personally embroiled in the controversy as an "activist seeking combat" or by reason of personal attacks upon the judge which in themselves cary a potential for bias.

In Offutt v. United States, 348 U. S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954), a fourteen-day trial was marked by an intermittent continuous wrangle between the trial judge and cousel for one Peckham. The court and Offutt were continuously arguing concerning the admissibility of evidence and the conduct and demeanor of each. The examination of witnesses was characterized by accusations and cross-accusations of the raising of voices, shoutings at one another, the waving of arms, and the making of unseemly gestures, all of which indicated that the court had become embroiled in the trial to the extent of carrying on a running fight with counsel for the defendant. It was really difficult to segregate the individual involvement of counsel and the court.

At the end of the trial the court declared Offutt guilty of contempt in open court and ordered him committed to the jail for a period of ten days. The United States Court of Appeals reduced the term to be served while the Supreme Court reversed the entire conviction. Such was reversed upon the ground that the trail court had become so deeply involved personally in the trial that his personal animosity toward Offutt was such that he could not impartially judge either the contempt or punishment of Offutt.

This case has been cited time and again for the theory that where a judge becomes personally involved, or

is "an activist seeking combat," he is thereby disqualified to act further. We do not find that here the trial court was an "activist seeking combat" with Taylor or otherwise. There is no evidence of personal embroilment or any type of controversy with Taylor. However, Offutt causes some considerable concern because in that case the court, in discharging the jury after the trial, made statements to them concerning Offutt's conduct and disrespectful performance and intimated that he should not be a member of the legal profession. The Supreme Court, in discussing the court's demonstrated bias and lack of impartiality, stated that these remarks made to the jury revealed his feelings toward the lawyer on whom he had to pass sentence.

The statements made in Offutt are somewhat similar to the statements made by Hayes in the presence of the jury and immediately prior to his sentencing Taylor. However, we do not take these statements as clearly demonstrating bias. The court had cited Taylor upon the contempt charges immediately upon his commission of the acts and at no time during the trial had the court made known to the jury that he had cited Taylor for contempt, much less the reasons for such citations. Here the remarks made by the court touching upon Taylor's conduct were more akin to a declaration of a charge against Taylor based upon the judge's observations and not a constitutionally disqualifying prejudgment of guilt.

The other disqualifying situation involves those events where the trial court is the object of a personal attack which in itself is of such a nature as to carry a potential for bias and thereby disqualify the judge from acting upon the contempt proceeding.

In Mayberry v. Pennsylvania, 400 U. S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971), the Supreme Court reversed a state criminal contempt sentence of eleven to twenty-two years on the ground that the due process clause of the 14th Amendment required a public trial before another judge,

viz.—that the trial judge was disqualified because of personal attacks upon him. We do not feel that this case has any application here for upon that trial the trial court was characterized as a "dirty sonofabitch," a "dirty, tyrannical old dog," a "stumbling dog," and told to "shut up" and "go to hell." The rule of Mayberry has been followed consistently, and probably its two most recent and famous proponents are the opinions in United States v. Seale, U. S. Court of Appeals, 7th District, 461 F. 2d 345 (1972), and In re Dellinger, U. S. Court of Appeals, 7th Circuit, 461 F. 2d 389 (1972). Of course, none of these latter cases has any application to the situation presently before this court, as it is crystal clear from the record that at no time did Daniel Taylor ever indulge in any personal attack of any kind upon the judge.

We might add one other distinguishing feature which we have noted in all of the cases cited above, and that is the fact that in none of them was the contemnor at any time during the trial notified that he was in contempt of court but rather the court waited until the conclusion of the trial and then, "out of the clear blue," cited the contemnor on numerous counts of contempt and forthwith passed sentence.

Taylor was warned upon each occasion of his contemptuous action and of the court's holding that he was in contempt. Therefore, the action of the court was not an unexpected event.

Although we have discussed the disqualification of the trial judge and the circumstances of disqualification, we feel that a great deal of consideration should be given to the holdings of the Supreme Court in Ungar v. Sarafite, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). Ungar, an attorney, was a prosecuting witness in a state criminal trial. However, he sought to exercise rights which he claimed to have as an attorney to dictate to the court the types of questions that he would answer, questions he would not answer, and to require rephrasing of questions if he did not

like them. He constantly refused to heed the court's instructions to answer questions and was argumentative and critical of the court's rulings. Ungar was cited for contempt and the court, without the intervention of a jury, sentenced him to ten days' imprisonment and imposed a fine. Ungar claimed his constitutional rights to a fair hearing were violated because the contemptuous remarks made by him were a personal attack upon the judge which necessarily biased and disqualified him. However, the Supreme Court held that Ungar's strong objections to the orders of the court and his conduct during the examination and a flat refusal to answer questions when directed by the court, together with his intemperate and strongly worded comments on the propriety of the court's ruling, were not sufficient grounds upon which to bottom the constitutional rule of disqualification. The court further held that the characterization of Ungar's conduct as contemptuous, disorderly, and malingering was at most a declaration of a charge against him and was not a constitutionally disqualifying prejudgment of guilt.

We are of the opinion in this case that although the remarks of Judge Hayes were inappropriate, in the light of the obvious guilt of Taylor these remarks were not such a showing of bias as to require the disqualification of the judge.

Taylor claims that under KRS 432.260 the court could not imprison him for more than thirty hours without the intervention of a jury.

This section limits contempt punishment to a maximum fine of $30 or imprisonment for not more than thirty hours without the intervention of a jury. The constitutionality of this section has been seriously questioned upon a number of occasions. A similar section, KRS 421.140, fixes the maximum punishment of a witness charged with contempt at a fine not exceeding $30 and imprisonment not exceeding 24 hours.

In Arnett v. Meade, Ky., 462 S. W. 2d 940 (1971), we held that the limits prescribed by KRS 421.140 materially interferred with the administration of justice and were, therefore, unconstitutional. Although efforts have been made to distinguish KRS 421.140 and KRS 432.260, we believe that such is a distinction without a difference. We have now concluded that for the same reasons as set out in Arnett v. Meade, supra, the limitations imposed by KRS 432.260 likewise constitute material interference with the administration of justice and, therefore, we hold such limitation to be unconstitutional.

Taylor next claims that even if the court had the authority to summarily sentence him for contempt, a sentence of three and one-half years without the intervention of a jury violates the 6th and 14 Amendments of the Constitution of the United States. Taylor is rather loose in his designation of the sentence imposed which he has tended all through this appeal to designate as three and one-half years. The truth of the matter is, as shown by the record, that Taylor was sentenced on eight separate charges of contempt, six of said sentences being for six months, one for ninety days, and other for sixty days. As we total all of them we, of course, come up with three years and five months. However, as far as this court is concerned we will treat them as separate sentences and not as a totality and shall so discuss them.

The Supreme Court has held upon a number of occasions that criminal contempt occupies the same position as any other criminal offense on the question of whether or not the contemnor is constitutionally entitled to a jury trial. If the offense was "petty," with the sentence being not more than six months, a jury trial was not required while if the offense was "serious," with the sentence being in excess of six months, the contemnor was entitled to a jury trial.

In Bloom v. Illinois, 391 U. S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968), the court held that in contempt pro-

ceedings where there was no maximum penalty, as we now have held, the seriousness of the offense for the purpose of determining whether or not a jury trial was constitutionally required is determined by the penalty actually imposed.

In Frank v. United States, 395 U. S. 147, 89 S. Ct. 1503, 23 L. Ed. 2d 162 (1969), the court held that sentences for criminal contempt up to six months may be constitutionally imposed without a jury trial, while in Cheff v. Schnackenberg, 384 U. S. 373, 86 S. Ct. 1523, 16 L. Ed. 2d 629 (1966), the court ruled that sentences for criminal contempt exceeding six months may not be imposed by federal courts absent a jury trial or a waiver thereof.

As these rules are based upon the constitutional right of a party to a trial by jury, they would apply equally to proceedings in a state court. It might be well to add at this point that there was not before the court in any of the cases cited the question of what is termed "aggregate sentences" for the purpose of determining the constitutional right to a trial by jury. No sentence meted out upon the charges against Taylor exceeded six months. Therefore, in the light of the cases above cited, Taylor was not constitutionally entitled to a trial by jury, and the sentences were not violative of any of his constitutional rights.

In United States v. Seale, U. S. Court of Appeals, 7th Circuit, 461 F. 2d 345 (1972), the court reaffirmed the rule that the 6th Amendment right to trial by jury applied to serious criminal contempts and that in determining whether or not such contempt was "serious" the courts were required to look at the penalty actually imposed. The court then held that for the purpose of determining whether or not a contemnor was entitled to a trial by jury it would be necessary to look to the aggregate of the sentences and not to the sentences separately. In other words, the rule in Seale is such that we must total the penalty imposed by each sentence for the purpose of determining whether or not a contemnor is constitutionally entitled to a trial by jury.

Taylor claims that the rule in Seale is controlling in determining whether or not his criminal contempt was serious and the sentence thus invalid because he was not granted a jury trial. The trial court on its original charges of criminal contempt ordered that the sentences be served consecutively. This court permitted the trial court to later file a corrected judgment reducing the number of acts of criminal contempt charges and amending the sentences imposed.

The corrected judgment does not direct that the sentences, as amended, be served consecutively; therefore, they must be served concurrently. Thus, the totality of the sentence actually imposed is a jail sentence of six months.

Seale does not apply here, for no matter how we aggregate the sentences we always come up with a total penalty of six months in jail. In Bloom v. Illinois, 391 U. S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968), the guidelines established by the Supreme Court predicate the constitutional right to a jury trial upon a determination of the penalty actually imposed.

The penalty actually imposed on Daniel Taylor is six months in jail. He was not entitled to a jury trial. Frank v. United States, 395 U. S. 147, 89 S. Ct. 1503, 23 L. Ed. 2d 162 (1969).

We hold that the sentences imposed on Daniel T. Taylor, III, must be served concurrently; viz.—one six month jail sentence, and except for this holding the judgment of the lower court adjudging him in contempt of court and fixing the penalty for each act of contempt is hereby affirmed.

Finally, Taylor appeals from an order which provided that as he had been found in contempt of court he was henceforth prohibited from the further practice of law in Jefferson Circuit Court, Criminal Branch, Second Division.

This court has for a number of years exercised the sole right to fix requirements for admission to the Bar and has likewise had the exclusive authority to discipline or disbar

attorneys. Cf. Ratterman v. Stapleton, Ky., 371 S. W. 2d 939 (1963).

However, long before the court assumed jurisdiction of disciplinary actions, suspension was not a permissible punishment for criminal contempt and this has been the rule in this Commonwealth since Adams v. Gardner, 176 Ky. 252, 195 S. W. 412 (1917).

The order and judgment prohibiting Taylor from the practice of law in the Jefferson Circuit Court, Criminal Branch, Second Division, is hereby reversed.

PALMORE, C. J., and MILLIKEN, OSBORNE, REED, STEINFELD, and STEVENSON, JJ., sitting.

All concur.

ORDER OF THE COURT OF APPEALS OVERRULING PETITION FOR REHEARING
June 15, 1973

PETITION FOR REHEARING OVERRULED—JUNE 15, 1973

THE COMMONWEALTH OF KENTUCKY

THE COURT OF APPEALS

73 Term—March 23, 1973

Daniel T. Taylor, III

v.

John P. Hayes, Judge Jefferson Circuit Court } File # W-311-72

Appeal from a judgment of the
Criminal Branch—2nd Division
Jefferson Circuit Court
144805

AMENDED MANDATE

The Court being sufficiently advised, it seems the judgment herein is erroneous in part.

It is therefore considered that said judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein, and that the appellee recover of the appellant ten percent damages on that part of the judgment

affirming and superseded herein; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended in this court.

A copy—Attest:

(s) Frances Jones Mills, C. C. A.

Issued June 15, 1973

ORDER OF THE COURT OF APPEALS STAYING EXECUTION AND ENFORCEMENT OF MANDATE
June 15, 1973

COURT OF APPEALS OF KENTUCKY
File No. W-311-72

DANIEL T. TAYLOR, III - - - - *Appellant*

v.

JOHN P. HAYES, Judge Jefferson Circuit Court - - - - - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Criminal Branch, Second Division
File No. 144805

ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF MANDATE

On motion of the appellant, a stay of execution and enforcement of the mandate is granted for a period of time to and including September 14, 1973, pending appellant's application for Writ of Certiorari in the Supreme Court of the United States, such stay being conditioned upon the execution of bond to the Commonwealth of Kentucky in the same amount as executed for bail pending appeal, with good and sufficient surety to be approved by the Jefferon Circuit Court that appellant will appear and satisfy the judgment of that Court upon the termination of this stay.

Palmore, C. J., Miliken, Osborne, Reed, Steinfeld and Stephenson, JJ., sitting. All concur.

ENTERED June 15, 1973.

(s) John S. Palmore
Chief Justice

CORRECTED JUDGMENT AND CERTIFICATE OF CONTEMPTUOUS ACTION IN THE PRESENCE OF THE TRIAL COURT

March 2, 1972

AT A COURT HELD MARCH 2, 1972

I hereby certify that the following contemptuous actions were committed in the Commonwealth vs. Narvel Tinsley and William Michael Tinsley, which trial commenced October 18, 1971, and continued from day to day, except Sunday, thereafter through October 29, 1971. This court finds that the acts, statements, and conduct of Daniel T. Taylor, III, the defendant in this contempt judgment, and the attorney on behalf of the defense for Narvel Tinsley, consitute (1) an attempt to prevent by improper means the proper functioning of this court; (2) a deliberate attack upon the administration of justice; and (3) mis-conduct by an attorney at law in practice before this court as would be calculated to destroy all respect for this court both by attorneys at law in practice before this court and by members of the general public if such mis-conduct went unnoticed and unpunished. The Tinsley case involved the trial of two black men on a charge of murdering two white, City of Louisville Police Officers. Mr. Taylor, on behalf of Narvel Tinsley, attempted to make a "Political" trial thereof and his misconduct, as hereinafter set out, made the task of keeping order in the court room and proceeding with a proper and fair trial to both the defendants and the Commonwealth most difficult. It would be quite difficult for this Honorable Court of Appeals to understand and

fully appreciate the full extent of Mr. Taylor's mis-conduct because this could be learned only from actual presence in the courtroom throughout the trial and actual observation of the manner in which Mr. Taylor conducted himself. Not unmindful of the fact that a transcript of record cannot express the tone of voice, derogatory expressions, and manipulation of hands and body, I am hereby making the entire transcript of testimony and proceedings, and the official tape recording of this trial as the record in this case. Although there is no comparable rule in the Kentucky Rules of Criminal Procedure, the following Certificate of Contempts are patterned in accordance with Fed. Rules Cr. Prac. Rule 42:

Contempt 1. Mr. Taylor, in questioning a prospective juror, on the second day of Voir Dire, repeatedly ignored the Court's order not to continue a certain line of questioning and to ask his questions of the jury as a whole, He evidenced utter disrepect for prospective jurors (T.E. 335-347)

Contempt 2. The court sustained the Commonwealth objection on the use of a prior statement to cross examine Officer Hogan and not to go into the escape of Narvel Tinsley. Mr. Taylor repeatedly and completely ignored the court's ruling (T.E. 1071-1080).

Contempt 3. During the playing of a tape recording of the voice of witness David White, Mr. Taylor wrote on a blackboard. After the playing of the tape it was ordered that the blackboard be removed from the court and Mr. Taylor was advised by the court that he could use it in his final summation to the jury. Mr. Taylor was disrespectful to the court by his tone of voice and manner when he replied, "I'll certainly keep that in mind, your Honor" (T.E. 1355).

Contempt 4. During cross-examination of Narvel Tinsley, by Mr. Schroering, Mr. Taylor interrupted and

moved for a recess, was overruled by the court, and then became most disrespectful to the court and refused to take his seat at counsel's table as ordered.

Contempt 5. Complete and utter disrespect by Mr. Taylor in the questioning of Mr. Irvin Foley, and attorney and Legal Advisor to the Louisville Police Department when he continually disobeyed the court's ruling regarding a press conference which the court had ruled on unadmissible (sic). Mr. Taylor accused the court of disallowing admittance of black persons in the courtroom during the examination of this witness and made a statement in the presence of the jury inferring that only white police officers could enter the courtroom. It has always been the rule of this court that there will be no interruption during the examination of a witness or during closing arguments by people coming and going into and from the courtroom, which rule was known to Mr. Taylor, (T.E. 1950-1955).

Contempt 6. The witness Jesse Taylor, a Louisville Police Officer, read a statement by witness, David White. A Ruling was made by the court that the statement spoke for itself, had been introduced in evidence and could not be commented on by Officer Taylor, who merely took the statement. Mr. Taylor continued to disregard the court's order and ruling by continually reading parts of the statement out of context (T.E. 2008-2016).

Contempt 7. Mr. Taylor in examining Mr. Norbert Brown, again referred to a press conference that the court had previously ordered him not to go into. He also waved his arms at the witness in a derogatory manner indicating the witness was not truthful and showing utter contempt of the court's ruling (T.E. 2030-2032).

Contempt 8. The court directed Mr. Taylor to call his next witness. He called Lt. Garrett, Louisville Police Department. After the witness was sworn and took the stand, a deputy Sheriff advised the court that Mr. Taylor's aide was not searched, as everyone else had been upon entering the courtroom. Mr. Taylor ordered the deputy to search his aide. The court ordered Mr. Taylor to begin his examination, which he refused to do until he was cited for contempt in the court's chamber (T.E. 2068-2069).

Contempt 9. Mr. Taylor repeatedly asked the same question of witness Floyd Miller that the court had held improper. He was also disrespectful in his tone of voice when referring to a certain police officer as "this nice police officer" (T.E. 2169-2172).

At the conclusion of the trial and after the jury had returned their verdict, Mr. Taylor was brought before the bench and sentenced as follows:

Count 1	—	30 days in jail
Count 2	—	60 days in jail
Count 3	—	90 days in jail
Count 4	—	6 mos. in jail
Count 5	—	6 mos. in jail
Count 6	—	6 mos. in jail
Count 7	—	6 mos. in jail
Count 8	—	1 year in jail
Count 9	—	1 year in jail

This court obviously was mistaken in the number of contempts and has permission of the court of appeals to correct this mistake. Accordingly, Count One, which was changed to a warning, is hereby deleted and held for naught. The two counts whereby Mr. Taylor was sentenced to one year in jail on each count are hereby reduced to six months

in jail on each count as dictated by the Sixth Amendment of the United States Constitution and the case of *Frank* v. *United States*, 395 U. S. 147 (1969). The judgment should read:

Count 1	—	60 days in jail
Count 2	—	90 days in jail
Count 3	—	6 months in jail
Count 4	—	6 months in jail
Count 5	—	6 months in jail
Count 6	—	6 months in jail
Count 7	—	6 months in jail
Count 8	—	6 months in jail

In accordance with the order of the court of appeals, entered February 21, 1972, the Circuit Court Clerk shall certify the above corrections in the record being prepared on appeal and shall certify copies of this corrected judgment to the defendant, Mr. Daniel T. Taylor, III.

Entered this 1st day of March, 1972.

/s/ John P. Hayes
Judge

I hereby certify that a copy of the foregoing was mailed to Mr. Robert A. Sedler, Attorney at Law, University of Kentucky, Lexington, Ky., this 2nd day of March, 1972.

/s/ Art DeWitt, D.C.

PROCEEDINGS UPON IMPOSITION OF PUNISHMENT FOR CONTEMPT
October 29, 1971

Transcript of Proceedings in *Commonwealth v. Tinsley*, pp. 2288-2291

The Court: Mr. Taylor, the Court has something to take up with you sir, at this time.

Mr. Taylor: Well, I'll be right here, Judge.

The Court: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean it's based upon planned confusion.

Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule.—

Mr. Taylor: (Interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that

a court is conducted. This is not the way an officer of a court should conduct itself.

Mr. Taylor: I would respond to you, sir—

The Court: (Interrupting) You're not responding to me on anything.

Mr. Taylor: (Interrupting) Oh yes, I will.

The Court: Yes, you're not, either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One—

Mr. Taylor: (Interrupting) Unless you intend to gag me—

The Court: (Interposing) I'll do that—

Mr. Taylor: (Interposing) My lawyers will respond to you—

The Court: (Interposing) I'll do that, sir.

Mr. Taylor: My lawyers will respond to you, sir.

The Court: You be quiet, or you'll—there will be some more contempts—

Mr. Taylor: (Interrupting) No, you heard what I said.

The Court: I have you nine counts. First Count, 30 days in jail; Second Count, 60 days in jail; Third Count, 90 days in jail; Fourth Count, six months in jail; Fifth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

Take him away.

Mr. Taylor: We will answer you in court.

The Court: I'd be glad to see you.

OCT 1 1973

Supreme Court Of The United States

No. 73-473

DANIEL T. TAYLOR, III - - - - Petitioner

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION - - - - - - - - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF OF THE LOUISVILLE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202

JOE G. LEIBSON
Marion E. Taylor Building
Louisville, Kentucky 40202

Counsel for Amicus, Louisville Bar Association

Of Counsel:
ED P. JACKSON
310 West Liberty Street
Louisville, Kentucky 40202

LAWYERS PRINTING CO., P. O. BOX 7742, LOUISVILLE, KY. 40207

TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS CURIAE	1- 2
REASONS FOR GRANTING THE WRIT	3-17
I. The Petitioner was Denied Various Constitutional Rights by the Decision of the Court of Appeals of Kentucky	3-12
II. The Constitutional Questions are of Critical Importance to the Fair Administration of Criminal Justice	12-17
CONCLUSION	17-18

TABLE OF AUTHORITIES

PAGE

Cases:

Anderson v. *Dunn*, 6 Wheat 204 (1821) 15
Baldwin v. *New York*, 399 U.S. 66 (1970) 5
Beasley v. *Wingo*, Ky., 432 S.W.2d 413 (1968) 4
Bloom v. *Illinois*, 391 U.S. 194 (1968) 5, 10, 17
Brown v. *United States*, 356 U.S. 148 (1958) 11
Cheff v. *Schnackenberg*, 384 U.S. 373 (1966) 5
Cooke v. *United States*, 267 U.S. 517 (1925) 6, 14
Green v. *United States*, 356 U.S. 165 (1958) 12, 13
Groppi v. *Leslie*, 404 U.S. 496 (1972) 6, 10
In Re Hammersmith, 4 EX. 87, 96, 154 Eng. Rep. 1136, 1140 (1849) 6
Ex Parte Hudgings, 249 U.S. 378 (1918) 11
Illinois v. *Allen*, 397 U.S. 337 (1970) 15
In Re Little, 404 U.S. 553 (1972) 11
McBride v. *Commonwealth*, Ky., 432 S.W.2d 410 (1968) 4
In Re McConnell, 370 U.S. 230 (1962) 10
Mayberry v. *Pennsylvania*, 400 U.S. 455 (1971) 6, 7, 10
In Re Michael, 326 U.S. 224 (1945) 10, 15
In Re Murchison, 349 U.S. 133 (1955) 8, 9
Offutt v. *United States*, 348 U.S. 11 (1954) 7, 11, 13
In Re Oliver, 333 U.S.257 (1948) 6
Sacher v. *United States*, 343 U.S. 1 (1952) 6, 9, 14
Shillitani v. *United States*, 384 U.S. 364 (1966) 15
Taylor v. *Hayes*, Ky., 494 S.W.2d 737 (1973) 8
Ungar v. *Sarafite*, 376 U.S. 575 (1964) 7
United States v. *Meyer*, 462 F.2d 827 (DC CA 1972) 6, 9-10
United States v. *Seale*, 461 F.2d 345 (CA 7, 1972) 5, 11
Weiss v. *Burr*, CA 9 5/21/73, 13 Cr L2286 6

Miscellaneous Authorities

Edward Livingston Works, Vol. 1, p. 260 (1873) 13

SUPREME COURT OF THE UNITED STATES

No. 73-473

DANIEL T. TAYLOR, III — *Petitioner*

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION — *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF OF THE LOUISVILLE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Louisville Bar Association, as Amicus Curiae, respectfully submits this brief in support of the Petition for Writ of Certiorari and urges the Court to grant the petition.

INTEREST OF THE AMICUS CURIAE

The Louisville Bar Association was established in 1900, originally comprising a small group of attorneys in the local community. Over the years, the Association

has gradually grown to a membership numbering over 1,000 attorneys and judges from the entire metropolitan area. The purposes of the Association, as enumerated in its constitution, are to promote and maintain high standards for the legal profession; to promote legal education; to cultivate association and acquaintance among the members of the Bar; to increase their usefulness in the administration of justice; and to promote legal and judicial reforms.

In furtherance of these goals and in the interest of its membership, the Association submits this brief. This case is one in which a lawyer has been summarily convicted of contempt, sentenced to jail, and denied redress upon appeal.

The issues here do not, however, concern Daniel Taylor alone. They concern all practicing attorneys, not only in Louisville, but in every courtroom across the country. The issues in this case call into question the integrity and respect of our judiciary, the demeanor of our attorneys towards that judiciary, and the public's opinion and response to both the judiciary and the legal profession. These issues will necessarily be narrowed by the petitioner, but the decision will have a broad impact upon all lawyers.

Thus, the membership of the Louisville Bar Association has a vested interest in the outcome of this case as it relates to the balance between the summary contempt power of a judge and the constitutional rights of an attorney zealously representing his client.

REASONS FOR GRANTING THE WRIT

I

THE PETITION FOR CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE COURT SHOULD DETERMINE WHETHER THE PETITIONER WAS DENIED VARIOUS CONSTITUTIONAL RIGHTS WHEN THE KENTUCKY COURT OF APPEALS DECIDED CONSTITUTIONAL QUESTIONS RAISED BY THE PETITIONER ON APPEAL IN A MANNER WHICH VIOLATED THE LETTER AND SPIRIT OF APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

The Amicus presents the following points detailing the manner in which the Petitioner was denied certain Constitutional rights because any member of the Association could be dealt with in a similar manner. The summary contempt power and the method which was employed hereunder by the trial judge in its exercise, present a serious threat to the Constitutional rights of all practicing attorneys and their clients. This is the most compelling issue for the Court to consider when evaluating the Petition for Certiorari.

(A)

The Petitioner was Denied his Sixth Amendment Right to a Trial by Jury when the Court of Appeals Ruled That, in Spite of the Sentence Imposed, the Right to a Trial By Jury Did Not Arise.

The trial judge originally sentenced the petitioner to a total of 54 months imprisonment, such sentence to be served consecutively. More than four months later, the trial judge was allowed to correct his judgment by reduc-

ing the sentence for two specifications from one year each to six months each. This reduced the total sentence to 41 months and as the judge erroneously assumed, also foreclosed the Petitioner's right to a trial by jury.

Unfortunately, the trial judge neglected to specify in the corrected judgment whether the sentences of imprisonment were to be imposed concurrently or consecutively. However, the Court of Appeals of Kentucky held that because the sentences were not so specified, they were to be served concurrently and for this reason Taylor did not have a right to trial by jury. In so holding, the Court of Appeals completely overlooked the holdings in two of their recent decisions. In *Beasley* v. *Wingo*, Ky., 432 S.W.2d 413 (1968) the Court ruled that sentencing was in the discretion of the trial judge, not the Appellate Court. In *McBride* v. *Commonwealth*, Ky., 432 S.W.2d 410 (1968) the same Court held that sentences which do not specify between concurrently or consecutively are to be served *consecutively*. The Court of Appeals of Kentucky neglected to either cite, overrule, or even comment on these two recent decisions precisely on point. One can only conclude that the Court of Appeals of Kentucky mistakenly overlooked these decisions and were in error in the Taylor decision. The Constitutional guarantee to a trial by jury is one of the most cherished rights a person has. Throughout our history this right has been jealously guarded by our Courts. We respectfully contend that the Supreme Court of the United States should not countenance an after the fact alteration of a jail sentence by the trial judge, an oversight, mistake, or error by the Court of Appeals of Kentucky to deny an attorney his

Constitutional right of trial by jury. While it is recognized that the Court has not specifically required aggregation of multiple contempt sentences, under either the original sentence or the corrected sentence, the Petitioner would have a Constitutional right to a trial by jury according to the import of the decisions of this Court in *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Bloom* v. *Illinois*, 391 U.S. 194 (1968); and *Baldwin* v. *New York*, 399 U.S. 66 (1970); and the decision of the Seventh Circuit in *United States* v. *Seale*, 461 F.2d 345 (CA 7, 1972).

(B)

The Trial Judge Violated the Petitioners' Constitutional Guarantee of Due Process of Law Under the 5th and 14th Amendements and His 6th Amendment Right to the Assistance of Counsel, When he Denied the Petitioner a Hearing on the Charges, a Specification of the Charges and an Opportunity to Speak in Defense or Mitigation of Those Charges.

At the conclusion of trial, the judge proceeded to sentence Mr. Taylor on the contempt citations brought during the trial. The Petitioner was prevented from speaking in his defense to the extent that the judge threatened to forcibly silence him. Since the trial judge delayed the disposition of the citations, and because at the time of sentencing he was not acting to quell a courtroom disturbance, to preserve the dignity of the court, or to protect the safety of courtroom personnel, the denial of a hearing, the assistance of counsel, the opportunity to speak in defense or mitigation, and the failure to advise the Petitioner of the charges, was violative of

procedural due process. *Weiss* v. *Burr;* CA 9 5/21/73. 13 Cr L2286. The judgment of the Court of Appeals of Kentucky is in direct conflict with the decision of the 9th Circuit.

One of the most fundamental principles of Anglo-American law is that "no one shall be punished without having had an opportunity to be heard in his defense". *Groppi* v. *Leslie* 404 U.S. 496, 501 (1972); In re *Oliver* 333 U.S. 257,273 (1948); In re *Hammersmith* 4 EX. 87, 96, 154 Eng Rep 1136, 1140 (1849). The summary contempt power is justified as necessary for a judge to protect the due and orderly administration of justice and to maintain the authority and dignity of the court. *Cooke* v. *United States,* 267 U.S. 517 (1925); In his dissent in *Sacher* v. *United States,* 343 U.S. 1, 30 (1952), Justice Frankfurter held that the contempt power had implied restrictions:

> " . . . Among the restrictions to be implied, as a matter of course, are two basic principles of our law—that no judge should sit in a case in which he is personally involved and that no criminal punishment should be meted out except upon notice and due hearing, unless overriding necessity precludes such indispensable safeguards for assuring fairness and affording the feeling that fairness has been done."

Once the trial was ended there no longer exists an overriding necessity which could justify the use of the summary contempt power. *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971); *United States* v. *Meyer,* 462 F.2d 827 (DC CA 1972). Just as in the case of an indirect contempt, no reason exists of great enough importance to deny the contemnor procedural due process of law. As the Court held in *Cooke* v. *United States* 267 U.S. 517, 537 (1925):

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel."

Therefore, since the judge waited until after the trial to pass sentence, he should have conducted a hearing on the charges with all attendant Due Process and Sixth Amendment guarantees before he passed sentence upon the Petitioner.

(C)

The Petitioner was Denied His Constitutional Right to a Fair Trial Before an Impartial Judge When the Court Of Appeals Affirmed the Judgment of the Trial Court, Where Clear and Compelling Evidence of the Trial Judge's Prejudice Towards the Petitioner was Apparent From the Record.

It has been well established by this court that a fair trial before an impartial magistrate is essential to Due Process. *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971). It was the considered opinion of the Court of Appeals of Kentucky, in the decision below, that the conduct of the trial judge was not prejudicial nor was there evidence of bias which would disqualify him from exercise of the summary contempt power. The Court of Appeals applied the decisions of the Supreme Court in *Offutt* v. *United States,* 348 U.S. 11 (1954), *Mayberry* v. *Pennsylvania,* Supra, and *Ungar* v. *Sarafite,* 376 U.S. 575 (1964) and did not find that "the trial court was an 'ac-

tivist seeking combat' with Taylor nor "did Daniel Taylor ever indulge in any personal attack of any kind upon the judge". *Taylor* v. *Hayes*, Ky., 494 S.W.2d 737, 744 (1973). They concluded that as long as the judge avoided becoming personally embroiled in controversy with the contemnor and the contemnor had not personally attacked the judge, they were not constrained to find bias or prejudice in the trial judge's conduct.

The standards of fairness that the Supreme Court applied to the contempt situation in *In re Murchison* 349 U.S. 133, 136 (1955), are rigorous.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome . . . Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law . . . But to perform its high function in the best way 'Justice must satisfy the appearance of Justice' ".

It is very difficult for a judge who has presided over a trial to be objective in dealing with a contemnor. It would be more realistic to assume that no trial judge before whom allegedly contemptuous acts are committed can properly and fairly conduct a summary contempt proceeding in an impartial and disinterested manner that would conform to the demands of due

process. Justice Jackson in his opinion in *Sacher* v. *United States,* 343 U.S. 1, 12 (1952) outlines the problem:

> " . . . It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other."

That the trial judge made disparaging remarks about Daniel Taylor and dealt with him in an unusual manner cannot be doubted. These remarks and actions are well chronicled in the Petition for Certiorari at pp. 20-28. The Amicus believes that these events clearly establish the fact that the trial judge adopted an adversary posture in regards to Mr. Taylor and should therefore have been disqualified from passing sentence at the conclusion of the trial. The standard that the Court of Appeals of Kentucky applied to the conduct of the judge was not Constitutionally stringent enough to determine whether Due Process had been violated because the Appeals Court failed to consider whether the judge had adopted an adversary posture towards the contemnor. *In re Murchison* 349 U.S. 133 (1955); *United States* v. *Meyer,* 462 F.2d 827 (CA DC 1972). Policy justifications for the use of summary power are overcome by the adversary posture of the judge and the conclusion of trial. Therefore the trial judge was disqualified from passing sentence upon Mr. Taylor.

" . . . It is enough to have concluded that the circumstances of this case do not give the appearance of judicial impartiality which in order to protect both alleged contemnors and the integrity of the judiciary, must be equated with the substance of impartiality. "Justice," as Justice Frankfurter wrote in an oft-quoted passage in Offutt, "Must satisfy the appearance of justice."

United States v. *Meyer,* Supra., p. 845

(D)

The Petitioner was Denied His Constitutional Right to Due Process of Law Under the 14th Amendment When the Court of Appeals Affirmed the Conviction Upon Specifications of Actions Which Were not Sufficient at Law to Constitute the Crime of Contempt and When the Court of Appeals Failed to Make a Reasonable Inquiry Into the Record to Establish the Elements of Contempt.

The elements of the crime of contempt are very vague and subjective because, historically judges have been given great latitude in exercising the summary contempt power. Summary punishment has always been regarded with disfavor and within recent years there has been a tendency on the part of the Court to limit its exercise, *Groppi* v. *Leslie,* 404 U.S. 496 (1972); *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971); *Bloom* v. *Illinois,* 391 U.S. 194 (1968). However, this Court has dealt with the issue of what constitutes a contempt in very general terms. It was held in *In re McConnell,* 370 U.S. 230, 234 (1962) that the conduct must amount to an "actual obstruction of justice", in *In re Michael,* 326

U.S. 224, 227 (1945) that the contempt must effect an "immediate interruption" of the court's business, and in *Ex Parte Hudgings*, 249 U.S. 378, 383 (1918) that the obstruction must be clearly shown. "It has frequently been held, and considerable scholarly comment support the view, that mere disrespect or affront to the judge's sense of dignity will not sustain a citation for contempt" *United States* v. *Seale*, 461 F2d 345, 369 (CA 7 1972); *Offutt* v. *United States*, 348 U.S. 11 (1954); *Brown* v. *United States*, 356 U.S. 148 (1958).

There is a point where disrespect becomes a material obstruction and thereby contempt. The case of *In re Little*, 404 U.S. 553, 555 (1972), while not being specific, gives a clearer indication of the line between mere disrespect and actual obstruction:

> " . . . The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute and imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."

A showing of imminent threat to the fair administration of justice is therefore necessary to support a contempt conviction on appeal.

The Court of Appeals of Kentucky has not made such a showing in their opinion based on their examination of the trial record. Their entire opinion does not establish a specific instance of actual obstruction. Without ever considering the right of the Petitioner to zealously defend his client or the possibility that Judge Hayes misunderstood the Petitioner's actions, they

declare his conclusive guilt on all charges. Although numbers 3, 7 and 9 of the contempt specifications allege disrespect of the Court or persons therein, there is a total absence of any showing of an actual obstruction of the trial process. Justice Black's criticism of appellate review of contempt convictions in *Green* v. *United States*, 356 U.S. 165, 200 (1958) seems particularly appropriate here:

> ". . . a defendant's principle assurance that he will be fairly tried and punished is the largely impotent review of a cold record by an appellate court, another body of judges. Once in a great while a particular appellate tribunal basically hostile to summary proceedings will closely police contempt trials but such supervision is only isolated and fleeting. All too often the reviewing courts stand aside readily with the formal declaration that 'the trial judge has not abused his discretion.' "

Since the Court of Appeals of Kentucky failed to establish the elements of the crimes under the constitutional standards imposed by this Court the convictions cannot stand and are in violation of the Petitioner's Constitutional right to Due Process of Law.

II

THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS SERIOUS CONSTITUTIONAL QUESTIONS OF CRITICAL IMPORTANCE TO THE FAIR ADMINISTRATION OF CRIMINAL JUSTICE.

The summary contempt power of a judge to punish an offender without any of the Fifth, Sixth and Fourteenth Amendment guarantees of procedural Due

Process, stands as an anomaly in the law. It has been justified over the years because of the view that it was necessary to the orderly conduct of a trial that a judge have summary power to punish those who obstruct the proceedings or attack the integrity of the Court. The possibilities for abuse of the power are manifold because the power entrusted to a judge is "wholly unrelated to his personal sensibilities be they tender or rugged". Judges may "quite unwittingly identify offense to self with obstruction to law". *Offutt* v. *United States,* 348 U.S. 11, 13 (1954). The power is not only easily abused, the elements of the offense are ill-defined. As Justice Black said in his dissent in *Green* v. *United States,* 356 U.S. 165, 200 (1958):

> "It would be no overstatement therefore to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law."

The power is inconsistent with the principles of our Constitution, Bill of Rights and system of criminal justice which are based on the proposition that no one person should be vested with such excessive powers because they lend themselves so easily to abuse. As Edward Livingston said in his attack on the contempt power; *1 Edward Livingston Works* 260 (1873):

> "An offense so ill defined, so liable to be imputed, embracing such a variety of dissimilar acts, would be dangerous and oppressive in the extreme, were it to be prosecuted according to the ordinary forms of law; but all these are disregarded."

Thus the existence and use of the contempt power has a chilling effect on the freedom of attorneys and their clients in the exercise of their Sixth Amendment rights. This chilling effect applies especially in the case where the attorney is called upon to represent the defendant in a political trial or where his client has become notorious because of the nature of his crime or his controversial opinions. A broad summary power and the lack of meaningful Due Process guarantees, present a constant threat to the litigants' right to effective representation and the attorneys' willingness to be zealous in his defense. The problem was well stated by Justice Black in his dissent in *Sacher* v. *United States*, 343 U.S. 1, 18 (1952):

> "I cannot reconcile this summary blasting of legal careers with a fair system of justice. Such a procedure constitutes an overhanging menace to the security of every courtroom advocate in America. The menace is most ominous for lawyers who are obscure, unpopular or defenders of unpopular persons or unorthodox causes."

The power has been perpetuated because it has generally been viewed as indispensable. In the words of Chief Justice Taft " . . . The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the Court is most important and indispensable." *Cooke* v. *United States*, 267, U.S. 517, 539 (1925).

However, if that power could be limited or an alternative substituted which would just as adequately serve the purpose for which it was designed, then the sum-

mary contempt power must be altered or abolished. The exercise of the contempt power must be "the least possible power adequate to the end proposed". *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966); *Aderson* v. *Dunn*, 6 Wheat 204, 231 (1821); *In re Michael*, 326 U.S. 224, 227 (1945).

The Amicus believes that the ends proposed can be as adequately served by alternative methods while preserving the Constitutional rights of the accused. In the case of both litigants and attorneys the judge should deliver a citation for contempt which would have the same effect as an indictment. The threat of subsequent criminal action, and in the case of an attorney, the additional threat of professional disciplinary hearings, should be sufficient to control contumacious behavior in most cases. In the case of litigants the recent decision in *Illinois* v. *Allen*, 397 U.S. 337, 344 (1970) allows the court wide latitude for dealing physically with a disruptive defendant in a criminal trial:

> "We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly".

In the case of an attorney, if the threat of subsequent criminal action and professional discipline are not enough to restrain him, in those instances where the disruption is so great that it threatens the validity of the trial, it would be better to declare a mistrial and then cite the attorney for Contempt. This would protect the defendant and prevent a complete retrial of a long case

after a reversal by an Appellate Court. Otherwise, the court must bear the burden of a continuous contest between the attorney and the authority of the court resulting in a detriment to all parties involved and the possibility of prejudicing the jury.

In keeping with our belief that lesser measures would suffice we maintain that definitive standards should be imposed upon the summary contempt power to prevent abuse and protect the Constitutional rights of an alleged contemnor. Therefore, the Amicus respectfully submits the following standards for the consideration by this Court:

1. The trial judge's power to deal with contempt should be limited to the issuing of a citation for contempt and specifying the allegations upon which the contempt is based.

2. A judge other than the one issuing the contempt citation should preside at the hearing.

3. The contempt citation must be judged according to the standard that the contempt must amount to an actual, material and reasonably significant obstruction of the trial process or must amount to a serious attack upon the integrity of the Court.

4. The person cited shall be given ample time to employ counsel and prepare his defense.

5. If the summary power of a trial judge to find a Contemnor guilty during the trial is re-affirmed by this Court, then he should be barred from fixing punishment. The punishment, if any, must then be fixed by another judge in a separate hearing at the conclusion of the trial and after ample time for defense preparation.

6. The right of the accused to speak in his defense or mitigation of the crime is fundamental to Due Process of law and must be given even in summary proceedings for contempt.

7. The sentence which is imposed at the trial level determines the defendant's 6th Amendment right to trial by jury and cannot thereafter be modified to deny that right.

8. The Court should define the test laid down in *Bloom* v. *Illinois*, 391 U.S. 194 (1968), that one looks to the "penalty actually imposed" to mean specifically that the penalty actually imposed is the total of the penalties for each specification of contempt whether they are to be served consecutively or concurrently for the purpose of deciding the Defendant's right of trial by jury.

Detailed discussion of the above suggested standards is beyond the scope of this brief in support of the Petition for Certiorari. However in the event that Certiorari is granted, the Amicus is prepared to present substantial reasons why these standards should be adopted in a brief on the merits.

CONCLUSION

The Petition for Certiorari should be granted because Daniel Taylor was denied various Constitutional rights by the actions of the trial judge and the affirmance of those actions on appeal to the Court of Appeals of Kentucky.

This Petition should also be granted because this case presents a valuable opportunity for the Court to

reconsider the balance between the summary power of contempt and the Constitutional rights of alleged contemnors. The Amicus believes that the summary contempt power should be restrained further because it is in excess of the power actually needed to fulfill the end proposed. The Court should take up the Petition as an opportunity to set down definitive standards which would give the trial judge all the power necessary to control of the courtroom, while at the same time, conforming to the procedures which have been adopted to guarantee the accused Due Process of Law.

Wherefore, the Amicus respectfully urges the Court to grant the Petition for Certiorari in this case.

Respectfully submitted,

FRANK E. HADDAD, JR.
JOE G. LEIBSON
Counsel for Amicus,
Louisville Bar Association

OCT 9 1973

MICHAEL RODAK, JR., CLERK

Supreme Court Of The United States

October Term, 1973
No. 73-473

DANIEL T. TAYLOR, III - - - - Petitioner

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION - - - - - - - - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

HENRY A. TRIPLETT
HOGAN, TAYLOR, DENZER & BENNETT
231 S. Fifth Street
Louisville, Kentucky 40202
Attorneys for Respondent

LAWYERS PRINTING CO., P. O. BOX 7742, LOUISVILLE, KY. 40207

INDEX

	PAGES
NATURE OF THE CASE	1
QUESTIONS PRESENTED	1- 3
STATEMENT OF THE CASE	3- 7
REASONS FOR NOT GRANTING THE WRIT	7-15
I. Petitioner was not entitled to a trial by jury because the actual sentence imposed did not exceed six months	7- 8
II. Due process was afforded Taylor because the contempts were committed in open court and he was given an opportunity to respond	8
III. There was no showing of bias or personal hostility which required respondent to recuse himself and permit the contempts to be heard by another judge	9-11
IV. Petitioner was guilty of each and every contempt for which he was cited and many more	11-15
CONCLUSION	15

AUTHORITIES CITED

Cases:

	PAGES
Beasley v. *Wingo*, Ky., 432 S.W.2d 413	15
Bloom v. *Ill.*, 391 U.S. 194, 20 L.Ed.2d. 522, 88 S.Ct. 1477	8
Cheff v. *Schnackenberg*, 384 U.S. 373, 16 L.Ed.2d. 629, 86 S.Ct. 1523	8
Frank v. *U.S.*, 395 U.S. 147, 23 L.Ed.2d. 162, 89 S.Ct. 1503	7
Furman v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d. 346	3
Mayberry v. *Penn.*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d. 532	10
McBride v. *Comm.*, Ky., 432 S.W.2d. 410	15
Offut v. *U.S.*, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954)	9
Taylor v. *Hayes*, Ky., 494 S.W.2d. 739	11, 15
Tinsley v. *Comm.*, Ky., 495 S.W.2d. 776	3
Ungar v. *Sarafite*, 376 U.S. 575, 11 L.Ed.2d. 921, 84 S.Ct. 841	9
U.S. v. *Seale*, 7th Cir., 461 F.2d. 345 (1972)	14

Rules:

RCr 11.04(1)	15

SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-473

DANIEL T. TAYLOR, III — *Petitioner*

versus

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division — *Respondent*

NATURE OF THE CASE

This case involves a petition for a writ of certiorari to the Court of Appeals of Kentucky by Daniel T. Taylor, III, whose six months jail sentence for contempt was affirmed by the Court of Appeals of Kentucky, *Taylor* v. *Hayes*, Ky., 494 S.W.2d 739. Taylor is a lawyer, and the respondent, John P. Hayes, is the duly elected, qualified and acting Judge of the Jefferson Circuit Court, Criminal Branch, Second Division, a Court of general jurisdiction in Louisville, Jefferson County, Kentucky.

QUESTIONS PRESENTED

1. Where a contempt sentence does not exceed six months, is the defendant entitled to a trial by jury? The Court of Appeals of Kentucky answered this question in the negative, and the respondent contends that the answer should be in the negative.

2. Where contempts had been committed by an attorney in the prsence of the Trial Judge and the jury,

and where the attorney is immediately cited for contempt and given an opportunity to respond, is a subsequent hearing necessary before sentence is imposed? The Court of Appeals of Kentucky answered this question in the negative, and the respondent contends that the answer should be in the negative.

3. Where there is no showing or evidence of personal bias or hostility, and the Trial Judge is not personally embroiled with the attorney, is it essential that the Trial Judge recuse himself to permit another judge to try the contempts? The Court of Appeals of Kentucky answered this question in the negative, and respondent contends that the answer should be in the negative.

4. Where an attorney in the progress of a criminal trial constantly refuses to desist in his arguments, some in the presence of the jury and some at the bench, refuses upon occasion to maintain his seat so that orderly process of the Court was available to the defendant, disregarded the Court's orders and direction concerning the examination and argued with both jurors and witnesses, launched a long tirade seeking to have the Court remove opaque screens that had been placed over the windows and doors so as to lend some degree of privacy to the proceeding and protect the participants in the trial from the disconcerting demonstrations which were being conducted in and around the building, and where a monumental production was made of the fact that the Court was refusing to permit spectators and crowds, and where an attorney was overbearing, contemptous and obnoxiously persistent in his questions and objections, and where the attorney was intentionally disrespectful to witnesses, was the Trial Judge

justified in holding petitioner in contempt of Court? The Court of Appeals of Kentucky answered this question in the affirmative, and the respondent contends that the answer should be in the affirmative.

STATEMENT OF THE CASE

Petitioner, Daniel T. Taylor, III, was retained counsel for Narvel Tinsley, whose judgment of conviction for his participation in the murder of two policemen was affirmed by the Court of Appeals of Kentucky, *Tinsley* v. *Commonwealth*, Ky., 495 S.W.2d 776. His brother, William M. Tinsley, was represented by three appointed attorneys, Messrs. Fleming, McCall and Scott. The trial lasted from October 18 through October 29, 1971, and both William M. and Narvel Tinsley were sentenced to death. The death sentences were later reduced to life imprisonment pursuant to this Court's judgment in *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

Before the trial commenced, Narvel Tinsley escaped from jail and was recaptured unharmed. Taylor was cited nine times for contempt, although, after a serious discussion between Taylor and the respondent, the first contempt was changed to a warning.

We start with Volume II of the transcript, page 347, where the Court for the first time held Mr. Taylor in contempt for repeatedly asking questions that he had been directed not to ask. At this point, the Court indicated that it was going to take over the voir dire, and the colloquy continued through page 358, at which point, the respondent rescinded his order of contempt and warned Mr. Taylor. On page 357, respondent ad-

monished Mr. Taylor that his rules were to be obeyed. On page 354, the Court softened his ruling relative to taking complete control of the voir dire. A complete discussion was engaged in between Court and counsel relative to petitioner's conduct. It is obvious that respondent showed great restraint and great consideration in the proceedings concerning this first incident. Consider Mr. Taylor's interrogation of juror, Bruflat, on page 337 through page 345. He had been told not to repeat a certain question yet did it anyway. His questioning of juror, Robitalle, on page 330 through page 332 alone would sustain a contempt citation. Note the smart aleck interrogation of jurors commencing on page 280 and going through page 282 until stopped by the Court on page 283. See page 301 where the Court sustained an objection to a question, and Mr. Taylor replied that he did not believe there was an objection, whereupon, the Court observed he was making the objection, and Mr. Taylor flippantly replied that the Court could certainly sustain it.

The first actual contempt did not occur until Friday, October 22 (Vol. VII, T.E. 1080) when the Court cited Taylor for contempt because he completely and continuously ignored the Court's order not to discuss Narvel Tinsley's escape from the Jefferson County jail. The Court also criticized Taylor's courtroom antics, and a colloquy took place through page 1099. Taylor referred to the escape on page 1078, and after an objection was sustained to it on page 1078, he referred to that "little old case in the Jefferson County . . .", and on page 1080, Taylor was given an opportunity to respond for the record. Although Taylor had been told directly by the

Court how to use a previously written statement, page 1072, he ignored this on page 1075, 1076 and proceeded to inferentially and directly disregard the Court order (T.E. 1071, 1080). The next contempt occurred October 23, 1971, and may be found in Volume IX, page 1355, when after the Court admonished Taylor to stop arguing and Taylor replied, "I'll certainly keep that in mind, your Honor", in a contemptuous and smart aleck manner. Taylor responds to this citation from page 1356 through 1369. The Court comments on Taylor's tone of voice, his motions and his antics on page 1361.

The next one occurred during the cross-examination of Narvel Tinsley by Mr. Schroering and is found in Volume XII, page 1799. On page 1798, the Court had told Taylor to sit down. Taylor interrupted, the Court overruled him, Mr. Taylor continued, and the Court overruled him again, at which time, the proceedings were adjourned to Chambers where again Taylor was cited for contempt of Court. Mr. Taylor was permitted to respond from page 1801, and the discussion continued to and including page 1814. While in Chambers and on page 1804, the Court again admonished that when he ruled that was it and that when he told Taylor to sit down, he meant sit down, and in other words told him to stop arguing with every ruling of the Court and to obey the orders of the Court. We note Mr. Schroering's comments about Mr. Taylor's behavior on page 1814. The next contempt occurred in Volume XIII of the transcript and involved Taylor's direct examination of Ervin Foley, Legal Advisor to the Police Department (T.E. 1946). Taylor was actually held in contempt on page 1956, and on the same page was given an opportunity to

speak in respect to the contempt citation. An objection had been sustained to Taylor referring to a press conference, and he became obstreperous with the Court relative to some seating arrangement (T.E. 1951-1953) and gave a smart aleck reply to the Court's ruling (T.E. 1954, Q37).

Contempt number six involved witness, Jesse Taylor, and involved the use of a statement. The Court had sustained an objection to Taylor's use of the statement on page 2014, Volume XIV and notwithstanding this, Taylor continued to ask the very questions to which the Court had sustained an objection, pages 2015 and 2016, and on page 2016, again held him in contempt and told Taylor he could respond at the next recess.

Contempt number seven again involved Taylor going into the press conference and for waving his arms at a witness in such a fashion that caused counsel for William Michael Tinsley to object (T.E. 2031), and when Taylor was actually held in contempt and given an opportunity to respond for the record, he proceeded to, and after the Court returned, he wanted the record to reflect that at no time had Mr. Schroering been held in contempt. The fact that the Court briefly left the room in no manner prevented Taylor from denying that he had disobeyed the Court's order or that he had not flapped his arms in a contemptuous manner.

The next contempt occurred in Volume XIV, page 2068. Taylor had completed the direct examination of Lt. Garrett when it was called to the Court's attention that one of Mr. Taylor's aides had not been searched. The Court told Taylor to proceed, and Taylor refused. He was held in contempt on page 2069, and again collo-

quy occurred between Taylor and the Court through page 2075. Although the Court directly told Taylor to proceed, Taylor refused.

The last contempt occurred on page 2169 when Taylor asked witness Miller if he had "talked with this nice police officer . . . ", and this inspired an outburst of laughter from the audience (T.E. 2170). Taylor continued his improper examination of this witness in direct disobedience to the Court's order on page 2171, and Taylor again was held in contempt on page 2172, and Taylor made no request to be heard in defense or mitigation.

After the verdict was received, Judge Hayes, respondent, called Taylor to the bench and imposed the sentences on the contempts for which Taylor had previously been cited. After the judgments of contempts were entered and before the Court of Appeals of Kentucky affirmed these judgments, Judge Hayes modified his order and eliminated the request that the sentence be served consecutively and reduced the maximum sentence to that of one to six months.

REASONS FOR NOT GRANTING THE WRIT

I.

PETITIONER WAS NOT ENTITLED TO A TRIAL BY JURY BECAUSE THE ACTUAL SENTENCE IMPOSED DID NOT EXCEED SIX MONTHS.

This Court in *Frank* v. *United States*, 395 U.S. 147, 23 L.Ed.2d 162, 89 S.Ct. 1503, unequivocally held that sentences for criminal contempts of up to six months may constitutionally be imposed without a jury trial.

The judgments here were for criminal contempts, and the sentence did not exceed six months. Therefore, petitioner's claim that his right to a trial by jury was abridged here must fail. *Cheff* v. *Schnackenberg*, 384 U.S. 373, 16 L.Ed.2d 629, 86 S.Ct. 1523.

II.

DUE PROCESS WAS AFFORDED TAYLOR BECAUSE THE CONTEMPTS WERE COMMITTED IN OPEN COURT AND HE WAS GIVEN AN OPPORTUNITY TO RESPOND.

In *Bloom* v. *Illinois*, 391 U.S. 194, 20 L.Ed.2d 522, 88 S.Ct. 1477, we find the following language cited from an earlier case.

> "Due process of law, therefore, in the prosecution of contempt, *except of that committed in open court**, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." (*emphasis ours).

In the case at bar, petitioner was given more than Bloom required. Although he was not entitled to respond under Bloom, he was permitted to do so. Thus, his claim of lack of due process must fail.

III.

THERE WAS NO SHOWING OF BIAS OR PERSONAL HOSTILITY WHICH REQUIRED RESPONDENT TO RECUSE HIMSELF AND PERMIT THE CONTEMPTS TO BE HEARD BY ANOTHER JUDGE.

We reiterate that at no time was petitioner cited for contempt in the presence of the jury. It will be remembered that after the first contempt, it was changed to a warning after a serious discussion between petitioner and respondent about petitioner's conduct. Nothing untoward was ever said by respondent to petitioner in the presence of the jury, although, numerous flippant and disrespectful statements were made to the Trial Judge in Chambers and out of the presence of the jury which would have warranted action by the Trial Judge. The only times petitioner was cited was for his conduct in the presence of the jury. The record in this case defies petitioner's contention that the Trial Court displayed hostility and personal animosity toward petitioner to the extent that another Judge should have tried the contempts. In *Ungar* v. *Sarafite*, 376 U.S. 575, 11 L.Ed.2d 921, 84 S.Ct. 841, this Court held that the characterization by the Trial Judge of Ungar's conduct as contemptuous, disorderly, belligerent, was at most a declaration of a charge against him, and was not a constitutional disqualifying prejudgment of guilt. The Ungar case arose from the trial of Hulan Jack for violation of New York's conflict of interest law and for a conspiracy to obstruct justice. The case here is totally different from *Offut* v. *U. S.*, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed.11 (1954), where there was total war for fourteen days between Offut and the Trial Judge

accompanied by accusations, shouting, unfitting gestures, all of which properly put the case within the recent terms of *Mayberry* v. *Penn.*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532.

At any rate, the Court of Appeals of Kentucky completely disposed of this contention in the following language:

> "Throughout his brief, Taylor complains continuously of the conduct of the judge. He is identified as 'an activist seeking combat' and charged with an actual intent on his part to purposely 'bait' Taylor beyond the endurance of any lawyer to accept such vilification and abuse. The judge is charged with exercising an 'uncontrollable animus' toward Taylor during the entire proceedings and with fighting him on a personal basis because he was attorney for Narvel Tinsley. Taylor's brief says that such charges are grave, and this court agrees with him to the extent of saying that the brief in itself demonstrates something less than complete and total respect for the judicial system of this Commonwealth. Our examination of the record fails to substantiate in the least any of the charges of misconduct on the part of the court that were discussed and complained about in Taylor's brief. In fact, we reach a contrary conclusion, for it seems to us that the court 'leaned over backwards' in an effort to assure Narvel Tinsley a fair trial in spite of the misconduct of his attorney."

The most cursory examination of the record completely supports the finding of the Court of Appeals of Kentucky. The transcript unequivocally shows the Trial Judge did everything but beg petitioner to behave himself, and this he cavalierly refused to do. There were

no insults, vilifications, shouting matches or anything else that would cause any reasonable person to conclude that Judge Hayes was "personally embroiled" with the petitioner to the extent he could not objectively deal with the contempts at the conclusion of the trial. We think that his remarks amount to "a declaration of charges", which is certainly permitted. It is not unusual for a Trial Judge in passing sentence, whether it be for contempt or for any other offense, to castigate the defendant. The fact that a Trial Judge might state at the time of sentencing that this is one of the most aggravated cases he has ever seen has never been successfully asserted as grounds to set aside the sentence as long as the sentence was within the statutory limits and proper sentencing procedures were followed.

IV.

PETITIONER WAS GUILTY OF EACH AND EVERY CONTEMPT FOR WHICH HE WAS CITED AND MANY MORE.

Throughout these proceedings, petitioner has constantly claimed that his actions did not amount to contempt to the extent that the administration of justice was obstructed. This question was resolved adversely to him by the Court of Appeals of Kentucky in a thorough opinion. Contrary to petitioner's assertion, the Court of Appeals of Kentucky outlined all nine contempts for which petitioner was cited. Although we are reluctant to cite copiously from *Taylor* v. *Hayes*, supra, we think the following language by the Court of Appeals of Kentucky defies petitioner's contentions that one, the contempts never occurred, and two, that the Kentucky Court did not consider them.

"We have examined the entire record of the Tinsley trial, and it becomes immediately apparent that even before the trial had 'gotten off the ground, so to speak,' Taylor had embarked upon a plan or program designed to disrupt the trial and by any means possible cause the trial court to commit trial errors which might form the basis of an appeal. His actions were such as to clearly illustrate that they were deliberate, delaying, or planned disruptive tactics which did in fact create such an atmosphere in the court that he, if permitted to continue, would have appeared to be the star performer in the center ring of a three-ring circus. He constantly harassed the court by innumerable objections, statements, and requests for conferences in chambers, and, in truth, the record indicates that a great percentage of the trial time was consumed by the court and counsel attending speeches made by Taylor in the court's chambers.

As the trial progressed, there was a constant refusal on the part of Taylor to desist in his arguments, some in the presence of the jury and some at the bench. He refused upon occasions to maintain his seat so that the orderly processes of the court were available to the defendants. He continuously disregarded the court's orders and directions concerning the examination of jurors or witnesses and persisted in repetitious questioning and argument with both jurors and witnesses. Taylor launched a long tirade seeking to have the court remove opaque screens that had been placed over the windows and doors so as to lend some degree of privacy to the proceedings and protect the participants in the trial from the disconcerting demonstrations which were being conducted in and around the building. Taylor claimed that by the

screening of the windows and doors his client was not receiving a public trial. Later, he made monumental production of the fact that the court was refusing to admit spectators in crowds, claiming that by reason of this policy his client was not receiving a public trial. Again, the clearing of the back two rows of benches in the courtroom following laughter, noise, and other disruptive practices by the spectators was claimed by Taylor to be prejudicial to his client's receiving a fair trial.

There is no necessity of detailing the innumerable acts of Taylor which clearly reflected his contempt for the court as well as the judicial system of this Commonwealth. His actions were such as to place on trial the entire judicial system of the Commonwealth and those judges sworn to uphold its Constitution and laws and thereby assured defendants a fair, orderly, and speedy trial.

Taylor was overbearing, contemptuous, and obnoxiously persistent in his questions and objections, and his misconduct was such that those attorneys representing Michael Tinsley, claiming that his antics prejudiced the rights of their client, were continually objecting to his tactics and moving the court that a severance be granted. The incidents necessitating objections on the part of Michael Tinsley's attorneys were so persistent and so constant that rather than consume the time of the court in a constant repetition of the rather involved objection and motion, the parties got to the place of calling it 'Objection No. 1.' We find all through the record this Objection No. 1 made on behalf of Michael Tinsley.

In the light of the entire record this court can only conclude that Daniel Taylor was guilty of each and every contempt as charged by the court, and if

> the court had so desired there could have been numerous other charges assessed in the course of the trial. In spite of Taylor's contemptuous conduct throughout the trial, we do not find at any point in the record an occasion where Taylor made any personal attack upon the judge, his integrity, or ability. On the contrary, Taylor was polite to the point of almost being condescending. At no time was his conduct of such a nature as to create a personal controversy between him and the court."

The Court also considered *U. S.* v. *Seale*, 7th Cir., 461 F.2d 345 (1972), and the Court of Appeals quoted the following language from *Seale*, which is applicable here.

> "On the positive side of the obstruction question, failure to heed the directive of the court to desist from arguing, to sit down, or to remain quiet may indeed constitute an actual material obstruction to the administration of justice. The unmistakable implication of In re McConnell, 370 U.S. 230, 235, 236, 82 S.Ct. 1288, 8 L.Ed.2d 434, is that defiance of the court's order to cease questioning would have actually obstructed the proceedings. As governor of the trial, the trial judge must have the authority necessary to ensure the orderly and expeditious progress of the proceedings. His directives in exercise of this authority must be obeyed; otherwise the clear result would be courtroom chaos. Wholly arbitrary limits on argument will, if prejudicial, merit reversal of the substantive case, but that hardly can excuse open defiance of the court's commands. * * * We do not say that automation-like reflexive obedience to the court's order is necessary to avoid a contempt citation. The law does not expect unhuman (sic) responsiveness. A certain amount of leeway must be allowed. But

> where the directive is clear, the judge's insistence on obedience is not undercut by his further rejoinder, and the party directed understands what is being asked of him, he must obey. * * *."

The truth of the matter and the transcript shows it is that petitioner fancies himself different from every other practitioner and is suffering under some delusion that he has rights that other lawyers do not enjoy. He has no right, constitutional or otherwise, to deliberately turn a serious criminal trial into chaos.

CONCLUSION

Taylor makes some claim that the Trial Judge by correcting its judgment, and the Court of Appeals of Kentucky's affirmance thereof, that he has been deliberately denied his right to a trial by jury. Petitioner cites *McBride* v. *Commonwealth*, Ky., 432 S.W.2d 410, which involved a collateral attack on an unappealable judgment, and *Beasley* v. *Wingo*, Ky., 432 S.W.2d 413, which involved a sentence from another state. RCr 11.04(1) says in part that if two or more sentences are imposed, the judgment shall state whether they are to be served concurrently or consecutively. We see little reason for a presumption of consecutiveness if the judgment is silent. Irrespective of what *Beasley* v. *Wingo*, said, the Court of Appeals in *Taylor* v. *Hayes*, Ky., 494 S.W.2d 739 said, "The corrected judgment does not direct that the sentences, if amended, be served consecutively; therefore, they must be served concurrently." Therefore, it must be concluded that any inconsistent inference which may be given *Beasley* v. *Wingo* has been overruled by *Taylor* v. *Hayes*, supra.

Certiorari should not be granted here because no federal right of Taylor's is involved.

WHEREFORE, it is respectfully demanded that this Court deny petitioner's petition for a writ of certiorari to the Court of Appeals of Kentucky and grant all other and proper relief in the premises.

Respectfully submitted,

HENRY A. TRIPLETT
HOGAN, TAYLOR,
DENZER & BENNETT
Attorneys for Respondent

INDEX

	Page
Interest of National Lawyers Guild as Amicus Curiae	1
Reasons for Granting The Writ of Certiorari	3
Conclusion	6

Table of Cases

Baldwin v. New York, 399 U.S. 66 (1970)	5
Bloom v. Illinois, 391 U.S. 194 (1968)	5
Groppi v. Leslie, 404 U.S. 496 (1972)	4
In re Dellinger, 461 F.2d 389 (7th Cir. 1972)	4
In re Little, 404 U.S. 553 (1972)	3
In re McConnell, 370 U.S. 230 (1962)	3
Johnson v. Mississippi, 403 U.S. 212 (1971)	4
Mayberry v. Pennsylvania, 400 U.S. 455 (1971)	4
Offutt v. United States, 348 U.S. 11 (1954)	4
United States v. Meyer, 462 F.2d 827 (D.C. Cir. 1972)	4
United States v. Meyer, 346 F.Supp. 973 (D.D.C. 1972)	4
United States v. Seale, 461 F.2d 345 (7th Cir. 1972)	5
Weiss v. Burr, ____F.2d ____, 13 Crim.L.Rep. 2284 (9th Cir., May 21, 1973)	5

In The

SUPREME COURT OF THE UNITED STATES

No. 73-473

DANIEL T. TAYLOR III,

Petitioner,

v.

JOHN P. HAYES, Judge,
Jefferson Circuit Court,

Respondent.

IEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE
SUPPORT OF PETITION FOR WRIT OF CERTIORARI*

INTEREST OF NATIONAL LAWYERS GUILD

The National Lawyers Guild is an association
f lawyers, law students and legal workers dedicated to
orking for a society which more adequately meets the
eeds of the nation's people. The Guild seeks to place

* Letters from the respective parties consenting to the submission of this amicus have been filed with the Clerk of this Court.

the skills of its members in the service of those who are struggling against oppression, and to further the cause of civil rights and civil liberties. The Guild has often submitted amicus briefs in this Court and other courts throughout the United States where the circumstances or legal issues presented are of broad public importance.

We are particularly interested in this case, for the actions of the Kentucky courts constitute a serious assault on the constitutional and historical right, indeed duty, of an attorney to represent with vigor and skill a black client accused in a hostile southern community of the murder of two white policemen. Moreover, the outcome of this case holds significance for attorneys and defendants far beyond its immediate boundaries. The Guild believes that if the decision of the Court of Appeals of Kentucky is allowed to stand unreviewed by this Court, it will be a signal to those who undertake to represent persons held in disfavor that they in turn may not be provided with dispassionate and careful review of charges which may be lodged against them as a result of their efforts.

REASONS FOR GRANTING THE WRIT

The history of this case is reviewed in detail the main petition; that statement is adopted herein.

Unless reviewed by this Court, the decision below uld seriously erode both substantive limitations and ocedural safeguards which this Court has developed to otect vigorous advocates from the ire of an offended cal judiciary.

This Court has limited the criminal contempt pow- in cases of this nature to situations in which an ad- cate "creates an obstruction which blocks the trial udge in the performance of his judicial duty." In re cConnell, 370 U.S. 230, 236 (1962). See also, In re Little 04 U.S. 553 (1972). The court below failed to analyze hether the specific conduct of petitioner cited by respon- ent violated this standard. Instead it opined that peti- ioner engaged in "planned disruptive tactics" throughout he trial of his client generally and affirmed the judg- ent against and imprisonment of petitioner without con- ideration either of the circumstances of the trial or of he specific charges against him. It is significant that veral of the charges against petitioner appear similar

to those against other attorneys which were held legally insufficient by the United States Court of Appeals for the Seventh Circuit in In re Dellinger, 461 F.2d 389 (7th Cir. 1972). See also United States v. Meyer, 346 F.Supp. 973 (D.D.C. 1972).

Moreover, the Court did not consider in a meaningful way the significant procedural issues raised by the action of the respondent. The following questions were given either superficial treatment or no consideration at all:

a) whether the question of petitioner's alleged contempt should have been referred for adjudication to an impartial trial judge in accordance with this Court's decisions in Mayberry v. Pennsylvania, 400 U.S. 455 (1971), Johnson v. Mississippi, 403 U.S. 212 (197 and Offutt v. United States, 348 U.S. 11 (1954). See also United States v. Meyer, 462 F.2d 827 (D.C. Cir. 1972);

b) whether the petitioner should have been given the right to speak in his own defense, however briefly, in conformity with this Court's decision in Groppi v. Leslie, 404 U.S. 496 (1972). We note that the United States Court of Appeals for the Ninth Circuit has recently held that du process requires that an attorney accused of contempt duri

completed trial in which he was counsel be given the opportunity to explain his alleged conduct before he may be adjudged in contempt. See Weiss v. Burr, ___F.2d_____, 3 Cr.L.Rep. 2284 (9th Cir., May 21, 1973). The affirmance below appears to be squarely in conflict with the decision of the Ninth Circuit;

c) whether the constitutional right to trial by jury of serious charges of contempt, see Bloom v. Illinois, 391 U.S. 194 (1968) and Baldwin v. New York, 399 U.S. 66 (1970), can be defeated by the joint post-sentencing actions of the trial and appellate courts, the former "correcting" the judgment against petitioner so that no sentence on any one specification exceeded six months, the latter altering the sentences from consecutive to concurrent, contrary to established state law and practice. Compare United States v. Seale, 461 F.2d 345 (7th Cir. 1972).

By the very nature of his calling, the vigorous advocate for an unpopular client may be often placed in a position of conflict with judicial authority. Such clients are tried in highly emotional settings before judges conscious of their self-image due to media coverage. The potential for an allegation by an over-sensitive or personally involved judge runs high in such a situation.

Under these circumstances, when a trial judge does

take it upon himself to impose severe sentences on an attorney, the appellate courts must undertake a full and searching review to insure that a vigorous and independent bar, composed of attorneys willing to represent all segments of our society, will survive. It is precisely because the court below failed to engage in meaningful review, but instead apparently rubber-stamped the conduct of the trial judge toward an attorney he could not personally tolerate, that this case must be reviewed now. This Court must make clear that thorough and impartial review is required in cases of this nature and that vigorous advocacy in difficult trial situations will be protected.

CONCLUSION

For the reasons set forth herein, the writ of certiorari should be granted to review the judgment and opinion of the Court of Appeals of Kentucky.

Respectfully submitted,

James Larson

James Larson, President
Arthur Kinoy, Vice-President
National Lawyers Guild
23 Cornelia Street
New York, New York 10014

Of Counsel:

Lewis M. Steel

Dated: New York, New York
October 12, 1973

CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the aforegoing Brief of the National Lawyers Guild as Amicus Curiae have been served by airmail, postage prepaid, upon the following:

Robert A. Sedler
University of Kentucky College of Law
Lexington, Kentucky 40506

Henry A. Triplett
231 South Fifth Street
Third Floor
Louisville, Kentucky 40202

James Reif

INDEX

PAGE

Argument: The Arguments Put Forth by the Respondent in His Brief in Opposition Demonstrate Even More Clearly Why This Case Presents Substantial and Important Questions Calling for the Grant of Certiorari by This Court 1–11

Conclusion 11

AUTHORITIES CITED

Cases:

	PAGE
Baldwin v. New York, 399 U. S. 66 (1970)	3
Bloom v. Illinois, 391 U. S. 194 (1968)	5
Brown v. United States, 356 U. S. 148 (1958)	10
Cooke v. United States, 267 U. S. 517 (1925)	4–5
Duncan v. Louisiana, 391 U. S. 145 (1968)	4
Frank v. United States, 395 U. S. 147 (1969)	3
Groppi v. Leslie, 404 U. S. 496 (1972)	5
Holt v. Virginia, 381 U. S. 131 (1965)	9
Johnson v. Mississippi, 403 U. S. 212 (1971)	9
In re Little, 404 U. S. 553 (1972)	10
In re McConnell, 370 U. S. 230 (1962)	10
Mayberry v. Pennsylvania, 400 U. S. 455 (1971)	9
Offutt v. United States, 348 U. S. 11 (1954)	9
United States v. Marshall, ___ S. 2d ___, 9th Cir., Sept. 7, 1973, 14 Crim. L. Rep. 2032 (1973).	9

Constitutional Provisions:

U. S. Const. Amend. VI	4, 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-473

DANIEL T. TAYLOR, III, - - - - *Petitioner*

v.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - - - - - - - *Respondent*

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

The Arguments Put Forth by the Respondent in His Brief in Opposition Demonstrate Even More Clearly Why This Case Presents Substantial and Important Questions Calling for the Grant of Certiorari by This Court.

The arguments put forth by the respondent in his Brief in Opposition (which he has incorrectly styled a "Response") show most clearly the dangers to the rights of both Attorneys and their clients that can result from entrusting Trial Judges with an unlimited power to impose summary punishment for purported contempts committed in their presence.

Before dealing with these particular arguments directly, we do, however, feel constrained to call the

attention of this Court to our disagreement with the conclusionary and misstated Statement of the Case that appears in Respondent's Brief in Opposition. In statement after statement occurring therein, respondent argues propositions that are simply not supported in the record of this case, below. Specifically, as to whether the various contempts here claimed against petitioner were clearly and specifically stated to Petitioner at the time of their occurrence, and whether a right of allocation was had as to same in the several instances charged against petitioner, an examination of the Transcript of Evidence from the trial of this case will show that the contentions of respondent in his Brief in Opposition in these two regards are simply not supported by the actual record. However, it is petitioner's position that a more appropriate time to deal with such substantive questions in this case will be at a later stage in these entire proceedings, to-wit upon a full review of this case, should Certiorari as here sought be granted.

Back on point, the Brief of respondent argues, in the main, as follows:

1. That respondent has the power to modify sentences retroactively in order to defeat the alleged contemnor's right to trial by jury;
2. That there is no right whatsoever on the part of an alleged contemnor to be heard in defense or mitigation when a Trial Judge proceeds summarily against him;

3. That in no way could the respondent herein be said to have been lacking in impartiality in dealing with the petitioner herein;

4. That conduct perceived by respondent as being "smart aleck" or disrespectful can be punished as criminal contempt, without regard to whether it has created a material obstruction to the administration of justice.

Respondent has joined issue on all of the issues presented in the Petition for Certiorari, and the nature of respondent's arguments demonstrates, particularly, the importance of the resolution of these issues to the administration of justice in this country.

The Respondent first argues that so long as the actual sentence imposed for contempt does not exceed six months, there is no right to a trial by jury, citing *Frank* v. *United States,* 395 U. S. 147 (1969). As the petitioner has argued (Pet., p. 13), the Kentucky Court of Appeals has read this Court's decisions in *Frank* and in *Baldwin* v. *New York,* 399 U. S. 66 (1970), as setting forth a "six month rule," and holding that whenever the sentence actually imposed is less than six months, there is no right to a jury trial, *regardless of other "objective criteria reflecting the seriousness of the offense,"* and the respondent agrees with this interpretation of what the Kentucky Court of Appeals has done. The petitioner, however, would submit that this Court has not held that the severity of the penalty is the *only* indication of the seriousness of the offense, and that where, as here, there are other

"objective criteria," such as the 54 month sentence originally imposed, showing that indeed a "serious offense" was allegedly committed, the Sixth Amendment's guarantee of the right to trial by jury applies, irrespective of the penalty that was actually imposed. *C.f. Duncan* v. *Louisiana,* 391 U. S. 145 (1968). Nor has it held that where the sentence imposed originally exceeded six months, that sentence can be modified retroactively by the trial judge or the reviewing court to bring it within a purported "six month rule"[1] and thereby defeat the alleged contemnor's right to a jury trial. Both of these questions are substantial, and should be resolved by this Court.

The respondent next contends that there is no right whatsoever to be heard in defense or mitigation when the trial judge proceeds summarily to punish for contempt. In support of this contention he has cited out-of-context language in *Cooke* v. *United States,* 267

[1]The respondent states: "After the judgments of contempts were entered and before the Court of Appeals of Kentucky affirmed these judgments, Judge Hayes modified his order and eliminated the request that the sentence be served consecutively and reduced the maximum sentence to that of one to six months" (Brief in Opposition, p. 7). To say the least, this statement is misleading. What the respondent did was to move the Court of Appeals to correct the judgment, and when this motion was granted, he filed a corrected judgment in which he reduced the sentences of one year's imprisonment imposed on count 8 and on count 9 to a sentence of six months' imprisonment on each count. He then set forth the sentences on each of the remaining counts. He did not specifically state that the sentences were to run consecutively, but he did not say that they were to run concurrently either (App., pp. 56a-57a of Pet.). It may also be asked why, if the respondent intended to limit the total punishment imposed to a maximum of six months' imprisonment, he argued in his brief before the Court of Appeals that he had the power to impose sentences aggregating 41 months' imprisonment so long as the sentence on no one count exceeded six months (Brief for Respondent-Appellee, pp. 2, 17).

U. S. 517, 537 (1925), quoted in *Bloom* v. *Illinois,* 391 U. S. 194, 205 (1968), to the effect that, "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." Neither *Cooke* nor *Bloom,* of course, involved an alleged contempt committed in open court. But it is precisely because the respondent can argue in this vein, and have such an argument upheld by the highest court of a state, that it is necessary for this Court to determine whether the right of allocution, which it has found to be "normally given" in the case of summary contempt proceedings, *Groppi* v. *Leslie,* 404 U. S. 496, 504 (1972), is required by due process of law.

The amicus curiae brief filed by the Louisville Bar Association argues cogently that the due process clause should be interpreted as prohobiting the trial judge from proceeding summarily to punish for contempt at all, notwithstanding that the alleged contempt was committed in his presence (Brief of Amicus Curiae, pp. 12-17). The petitioner fully endorses this view, but is also contending that due process requires that, at a minimum, an alleged contemnor be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed. This Court should grant certiorari to determine the applicability of the guarantees of procedural due process to summary contempt proceedings, and as

indicated by the case at bar, this question has not yet been fully resolved.[2]

With respect to the petitioner's contention that the respondent could not impartially sit in judgment on the multiple contempt charges, the respondent replies that, "There were no insults, vilifications, shouting matches or anything else that would cause any reasonable person to conclude that Judge Hayes was 'personally embroiled' with the petititoner to the extent that he could not objectively deal with the contempts at the conclusion of the trial" (Brief in Opposition, p. 11). This statement of the respondent simply is not true, and the record in this case proves it to be untrue. The fact is that there was a veritable flood of insult and villification flowing from this Trial

---

[2]The respondent also argues that although the petitioner had no "right" to respond, he was permitted to do so, presumably as a matter of "grace." The record is unmistakably clear, however, that the petitioner had no meaningful opportunity to respond to any of the charges. The respondent never specified what the charges were, nor did he impose any punishment at the time he held the petitioner in contempt. On counts 2 through 5 he did permit some discussion about the allegedly contemptuous conduct, but as the pages of the record cited by the respondent indicate, it was intertwined with a discussion of the substantive issues. The respondent did not say one way or another whether the contempt finding "stood" following the discussion, and, of course, he did not impose punishment. On counts 6 and 9 the respondent simply informed the petitioner from the bench that he was in contempt. He allowed the petitioner to make a response for the record on count 7, but then directed the court reporter not to put it in the record (Tr. 2032), and specifically refused to permit the petitioner to make a response for the record on count 8. The behavior of the respondent in this regard clearly demonstrates that he viewed the opportunity to be heard as a matter of "grace," and the Kentucky Court of Appeals in effect endorsed this view. If there is a right to be heard in defense or mitigation when the trial judge proceeds summarily to punish for contempt, that right was not afforded to the petitioner in the case at bar.

Judge and directed at petitioner throughout this entire trial, which pattern the Kentucky Court of Appeals characterized as "inappropriate" in that portion of its Opinion in which it attempted to skip over the vicious and arbitrary performance of this Trial Judge in his conduct of this trial; (in this same Opinion, petitioner was referred to as have been "courteous" throughout the entire trial, but, at the same time, somehow guilty of the most grievous affronts to the respondent).

The respondent's tirade from the bench at the conclusion of the trial, and his direction to his bailiffs to "take him (the petitioner) away", are viewed simply by the Kentucky Court of Appeals as a "declaration of the charges" (*Ibid.*). It is amazing to note what the respondent ignores! First, he ignores his *own* remarks to and about the petitioner throughout the trial, such as "I think you're putting on a show" (Tr. 348), "I may as well sit on him (the petitioner) right now" (Tr. 546), "Before it's over you might have a lot more than that (five months of petitioner's life) wrapped up in this case" (Tr. 1957), "There is no evidence even that this is a political case. That's what you guys (petitioner) try to make every case that comes into Court" (Tr. 1909), and on and on.

If the foregoing instances of respondent's remarks at this trial are not "insults and vilifications", evidencing hostility on the part of the respondent towards the petitioner, it might well be asked what would be. Respondent's Brief also ignores other actions of respondent, such as demanding that the peti-

tioner produce a list of all of the defense witnesses within fifteen minutes and then summarily deciding that many of them would not be permitted to testify, his issuance of an invalid order prohibiting the petitioner from the further practice of law in "his" court, and his refusing to admit the petititoner to bail or to even hold a bail hearing until he was ordered to do so by the Court of Appeals. He admits that he "castigated" the petitioner when imposing sentence from the bench, but says that this is not "unusual." While it may not be unusual in Louisville, Kentucky for this particular judge to "castigate" defendants (and threaten to gag them if they attempt to speak a word in their own defense), the sorrowful but inescapable truth is that respondent's words at the time he "castigated" the petitioner were clearly those of a man out of control of himself, and a jural officer completely in the grasp of passion and intemperateness, and demonstrate the unbelievable hostility and bias that he bore toward petitioner. Respondent also ignores the adversary posture that the Court of Appeals found existed between him and the petitioner, with him "on the defensive." 494 S. W. 2d at 742. He likewise ignores the fact that it was necessary for the petitioner to accuse him of denying his client's right to a public trial (Tr. 1895), and of acting on the basis in rancor in ruling that race was not an issue in the case (Tr. 1968), and finally that the petitioner unsuccessfully sought a delay in the case so that he could seek a writ of mandamus from the Court of Appeals to prevent

the respondent from proceeding further in the case (Tr. 1957).[3]

The holding of the Kentucky Court of Appeals to the effect that the respondent could impartially sit in judgment on the multiple contempt charges against the petitioner is so clearly inconsistent with the applicable decisions of this Court on the question of judicial disqualification, *e.g.*, *Offutt* v. *United States*, 348 U. S. 11 (1954), *Holt* v. *Virginia*, 381 U. S. 131 (1965), *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971), *Johnson* v. *Mississippi*, 403 U. S. 455 (1971), as to call for the grant of certiorari, and the reversal of that holding.

The petitioner has asked this Court to grant certiorari to determine the substantial question of what conduct on the part of an attorney engaged in the zealous representation of his client can be made punishable as criminal contempt, and has contended that the resolution of this question is necessary to fully implement the Sixth Amendment's guarantee of the effective assistance of Counsel.[4] In regard to this point, the reply of the respondent is merely that the petitioner was "guilty of each and every contempt for

---

[3]See, also, the recent case of *United States* v. *Marshall*, ____ S. 2d ____, 9th Cir., Sept. 7, 1973, 14 *Crim. L. Rep.* 2032, where improper conduct toward a lawyer on the part of the trial judge required that all further proceedings in the case be transferred to another judge.

[4]In this connection, it is appalling how little concern or regard for the right of the Defendant who was the subject of this trial, below, to receive a just and fair trial, is ever expressed by either the respondent herein, or those acting in his behalf. Nor does there appear any recognition of the simple fact that the abuse and throttling of his lawyer by a biased and intemperate Trial Judge totally destroys all possibility that a Defendant on trial can receive an adequate defense, and a fair and legal trial.

which he was cited", but, interestingly, respondent does not deal at all with the controlling and substantive question of whether the conduct for which petitioner was cited constituted an "imminent threat to the administration of justice." *In re Little,* 404 U. S. 553, 555 (1972). Throughout the Brief in Opposition, there is reference to the petitioner as being "smart aleck" and "flippant" and "obstreperous," and his efforts to zealously defend his client are characterized as "antics." What the respondent is essentially arguing(as he did in the court below) is that conduct *perceived* by him as being "disrespectful" can be punished as criminal contempt, without regard to whether it created a material obstruction to the administration of justice. The respondent has indeed confused "offenses to his sensibilities with obstruction to the administration of justice," *Brown* v. *United States,* 356 U. S. 148, 153 (1958), and the Kentucky Court of Appeals has sanctioned this confusion. As the Louisville Bar Association has pointed out in its amicus brief, "Their entire opinion does not establish a specific instance of actual obstruction" (Brief of Amicus Curiae, p. 11). This Court has made it clear that a lawyer cannot be convicted of criminal contempt unless he "in some way creates an obstruction which blocks the trial judge in the performance of his judicial duty." *In re McConnell,* 370 U. S. 230, 236 (1962). But it has not precisely defined what conduct on the part of an attorney can be made punishable as criminal contempt in the context of a particular case where multiple contempt charges have been levied and where the trial judge insists that conduct perceived by him as "dis-

respectful" can constitute criminal contempt. This opportunity is presented to the Court in the case at bar and clearly justifies the grant of certiorari.

CONCLUSION

This case presents to the Court a number of issues that go to the very heart of our system of Criminal Justice, which issues respondent has consistently attempted to obscure by painting the petitioner as one bent on creating some type of chaos in the Court room, when the truthful fact is that he is an able lawyer who fought, in this case, at great personal risk to himself, that his client might receive a fair trial in a case of the utmost seriousness imaginable. Additional to offering an opportunity to vindicate the principle of zealous advocacy, without which our Republic cannot stand, this case contains substantive issues as to due process and the right to trial by jury which are of the greatest importance to the entire legal profession in the United States.

Thus, for the reasons stated herein, and for the reasons set forth in the Petition for Certiorari, the Petition should be granted by this Court.

Respectfully submitted,

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

DORIS PETERSON
MORTON STAVIS
Center for Constitutional Rights
853 Broadway
New York, New York 10003

Attorneys for Petitioner

FILED
NOV 1 19
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-473

DANIEL T. TAYLOR, III, - - - - - Petitioner

versus

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - Respondent

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

ARTHUR J. MANDELL
Chairman, Amicus Curiae Committee, Association of Trial Lawyers of America
First National Life Building
Houston, Texas 77002

Counsel for Amicus, Association of Trial Lawyers of America

Of Counsel:
JOHN A. BURGESS
Chairman, Criminal Law Section Association of Trial Lawyers of America
Box 766
Montpelier, Vermont 05602

WESTERFIELD-SONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

TABLE OF CONTENTS

PAGE

INTEREST OF THE AMICUS CURIAE 1– 3

REASONS FOR GRANTING THE WRIT 3–12

I. The Petition for Certiorari Should Be Granted Because Serious Constitutional Issues Are Presented by This Case That Are of Paramount Importance to Trial Attorneys, Who Also Need to Know, With Particularity, What Conduct Is "Contemptuous", At Law, and Punishable as Such 3– 6

II. The Petition for Certiorari Should Be Granted to Determine Whether Or Not the Petitioner Was Denied His Sixth Amendment Right to Trial By Jury 6– 8

III. The Petition for Certiorari Should Be Granted to Determine Whether Petitioner Was Entitled, Under the Fifth, Sixth and Fourteenth Amendments, to the Assistance of Counsel, to Have Adequate Notice of the Charges, and to an Opportunity to Present a Defense or Matters in Mitigation, Prior to the Pronouncement of Sentence Against Him 9–10

IV. The Petition for Certiorari Should Be Granted to Determine Whether Petitioner Was Denied His Constitutional Right to a Fair Trial Before an Impartial Judge On the Facts of the Instant Case 11–12

CONCLUSION 12–13

AUTHORITIES CITED

Cases:

	PAGE
Baldwin v. New York, 399 U. S. 66 (1970)	8
Bloom v. Illinois, 391 U. S. 194 (1968)	8
Cheff v. Schackenberg, 384 U. S. 373 (1966)	8
Groppi v. Leslie, 404 U. S. 496 (1972)	10
In re Hammersmith, 4 Ex. 87, 154 Eng. Rep. 1136 (1849)	10
In re Little, 404 U. S. 553 (1972)	5
In re McConnell, 370 U. S. 230 (1962)	5
In re Oliver, 333 U. S. 257 (1948)	10
Mayberry v. Pennsylvania, 400 U. S. 455 (1971)	11
Offutt v. United States, 348 U. S. 11 (1954)	11
Sacher v. United States, 343 U. S. 1 (1952)	6, 10, 11
United States v. Seale, 461 F. 2d 345 (CA 7, 1972)	8

Constitutional Provisions:

U.S. Constitution, Amendment VI	4
U.S. Constitution, Amendment XIV	4, 7–8
U.S. Constitution, Amendment V	7–8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-473

DANIEL T. TAYLOR, III, - - - *Petitioner*

v.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - - - - - - - *Respondent*

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Association of Trial Lawyers of America, as Amicus Curiae, respectfully submits this brief in support of the Petition for Writ of Certiorari, and urges the Court to grant the petition.

INTEREST OF THE AMICUS CURIAE

The Association of Trial Lawyers of America is a body of approximately 27,000 trial advocates, voluntarily associated, and practicing law in all parts of the territorial United States. Its membership is composed of attorneys actually involved in Court room advocacy.

The Association is loosely divided into eight separate areas of interest to its members and to the profession in general, covering the full spectrum of the law, to-wit: tort law, environmental litigation, commercial litigation, criminal defense, family law, Admiralty law, Workmens Compensation, and Appellate practice.

The Amicus Curiae Brief which is here respectfully presented to the Court in the case instant was originally recommended, as to preparation, by the Chairman of the Criminal Law Section of the Association, and then approved by the officers of the Association, following which it has been prepared by the Chairman of the Amicus Curiae Committee of the Association of Trial Lawyers of America, and thereafter endorsed by President of the Association as exemplifying the ideals of the Association, as to the particular issues herein to which it addresses itself.

Both the general membership, and the elected leadership, of the Association of Trial Lawyers of America, identifies with and feels an extremely keen interest in the case now urged to the Court for *Certiorari,* and in its eventual outcome. The particular individuals throughout the Nation—practicing attorneys, all—who comprise this membership are voluntarily associated under a set of principles, the extension of which imbues them with a vested interest in the outcome of this particular litigation.

The Petition for Certiorari hereinbefore filed with this Court raises issues of such significance as to affect every member of the Association, as well as every trial

lawyer across the country. The manner in which this Court deals with the issue of summary contempt, as involved in the original proceedings against the Attorney-Petitioner herein, will have long-range implications as to how every member of the Association thereafter practices his profession. In fine, the resolution of the question regarding the actual breadth of the Constitutional protections to be afforded Attorneys who are faced with such contempt procedures as are involved in the instant case will be of paramount importance to the members of the Association of Trial Lawyers of America, for which reason it here respectfully files this *amicus curiae* Brief.

REASONS FOR GRANTING THE WRIT

I

The Petition for Certiorari Should Be Granted Because Serious Constitutional Issues Are Presented by This Case That Are of Paramount Importance to Trial Attorneys, Who Also Need to Know, With Particularity, What Conduct Is "Contemptuous", At Law, and Punishable as Such.

The power of a Judge to hold an attorney in contempt, when abused and exercised in an arbitrary and intemperate manner, can destroy not only the Constitutionally-protected right of a Defendant to Counsel, but can fundementally impair the fair administration of criminal justice. When such abuses do occur, the finely-balanced "referee" role of the Trial Judge becomes totally compromised, and a fair trial for the Defendant in such circumstances is totally impossible.

The actions of Petitioner which were ruled by the Respondent-Judge to be "contemptuous", which ruling the Kentucky Court of Appeals affirmed, involved situations that Trial Attorneys find themselves faced with daily. For an example, many lawyers believe that the voir dire examination of the prospective jurors is a determinative factor as to the outcome of the trial. When a Judge imposes the stringent limitations on the voir dire examination as was done here, and then, without any basis in fact, cites an attorney for contempt of Court (alleging that Petitioner "showed disrespect" to the prospective jurors), such a Judge is not only hindering the selection of a proper and unbiased jury as guaranteed by the Sixth and Fourteenth Amendments, but is grievously punishing the attorney for attempting to perform his sworn professional duty. That waving of an advocate's arms at an adverse witness ("indicating disbelief", as the Respondent-Judge charged Attorney-Petitioner in the case at Bar) should constitute a basis for punishment for contempt is an untenable result. It is noted, to expand on this a bit, that in the herein case, the Petitioner received one of the multiple contempt citations from this Judge for "waving his arms at a witness in a derogatory manner, indicating that the witness was untruthful, and thereby showing utter contempt for a prior ruling of the Court." (App., p. 55 of Pet.).* One wonders since when it has become improper in any way whatsoever for a defense attorney, conducting his cross-examina-

*Implicit in this interesting proceeding by this Trial Judge is the proposition that the Court had, then, already ruled, as a matter of law, that this witness was to be believed.

tion of a prosecution witness, to attempt to indicate that the witness is untruthful. The advocacy role of impeaching is historic, and essential to the advocacy system.

It is noted that all of the contempt citations placed against Petitioner by Respondent occurred in a heated criminal trial, of great local noteriety, wherein two young Black men were on trial for their lives for the alleged murders of two white policemen. As has been observed many times other than here, the adversary role of trial lawyers does not allow the trial of criminal cases to be carried out as a contemplative exercise. Almost invariably, murder trials, like the one here under consideration, ellicit passionate, heated feelings on both sides.

We urge that the present case is a particularly appropriate one in which this Court should consider the issue of *what* conduct on the part of a defense attorney constitutes "contempt" in the legal sense. Most of the contempt charges here leveled against Petitioner arose from an alleged lack of "respect" shown to the Court. However, the legal test of contempt is not "respect". *In re Little,* 404 U. S. 553 (1972). Nothwithstanding, this does appear to be the test that was here employed by the Trial Judge and the Kentucky Court of Appeals. As this Court has previously held, for "disrespect" to constitute criminal contempt, the attorney must "in some way create(s) an obstruction which blocks the Trial Judge in the performance of his Judicial duty." *In re McConnell,* 370 U. S. 230, 236 (1962). The record of the case here under inquiry

does not demonstrate any "material obstruction to the administration of justice".

If the actions of the Petitioner herein, while engaged in the zealous and vigorous defense of his hard-pressed client, are to be punished in this summary manner, every member of the Association of Trial Lawyers of America now finds himself within the area of danger. Thus, a problem will now confront American trial lawyers which was eloquently drawn by Mr. Justice Black in his dissent in *Sacher* v. *United States*, 343 U. S. 1 (1952), wherein he wrote, at page 18:

> "I cannot reconcile ths summary blasting of legal careers with a fair system of justice. Such a procedure constitutes an overhanging menace to the security of every courtroom advocate in America. The menace is most ominous for lawyers who are obscure, unpopular, or defenders of unpopular or unorthodox causes."

II

The Petition for Certiorari Should Be Granted to Determine Whether Or Not the Petitioner Was Denied His Sixth Amendment Right to Trial By Jury.

The question of what constitutes a "serious" contempt, as opposed to a "petty" contempt, within the concept of the right to trial by jury, as guaranteed by the Sixth Amendment, is, of course, one of extreme importance to the American system of trial advocacy. In the case of this Petitioner, he initially faced a period of fifty-four months in jail, for his alleged "contempts" committed during this trial. We are unaware

of any longer sentence given to any attorney for criminal contempt in the history of American jurisprudence. Four months after this original sentencing, the Respondent herein was allowed to "correct" the sentence herein. Under that "correction", all of the specifications of contempt were brought just under six months. This then reduced the cumulative sentence against Petitioner to forty-one months. Respondent then adopted the position that, since no single sentence against Petitioner *exceeded* six months, Petitioner had absolutely no right to a jury trial. Thereafter, the Kentucky Court of Appeals ruled that the sentences against Petitioner were to be served concurrently. (It is noted that in his "corrected" Judgment, previously referred to, the Respondent was silent as to whether said sentences were to be served concurrently or consecutively.) This "tailoring", by the Kentucky Court of Appeals, of Petitioner's jail time from an attackable forty-one months, to six, might seem to render this whole episode *de minimus,* but, actually, to a trial attorney with an active law practice, such confinement would be tantamount to an occupational death sentence.

To further stress the point we are here making, by its action last-alluded to, the Kentucky Court of Appeals changed the characterization of the alleged offenses from "serious" to "petty". Therefore, we urge, it has become incumbent upon this Court to set forth guidelines in contempt proceedings as to what constitutes "petty" and "serious" contempts of Court, within the meaning of the Fifth and Fourteenth

Amendments to the United States Constitution. Also, we are hopeful that the Court will speak to the proposition as to whether the right to trial by jury can be defeated by the actions of a Trial Judge and an Appellate Court, as was done here.

Historically, the right to trial by jury is the foundation of our system of criminal justice. We earnestly submit that Judges within the system deal with this right at their peril, when they attempt its abridgement. Further, we urge that an attorney is as much entitled to the protections here involved as is any other personage, high or low, coming before an American Court. Under the implication of the Opinions of this Court in *Cheff* v. *Schackenberg,* 384 U. S. 373 (1966), *Bloom* v. *Illinois,* 391 U. S. 194 (1968), and *Baldwin* v. *New York,* 399 U. S. 66 (1970), as well as the decision of the United States Court of Appeals for the Seventh Circuit as enunciated in *United States* v. *Seale,* 461 F. 2d 345 (CA 7, 1972), the Petitioner clearly had a Constitutional right to trial by jury in the circumstances hereof, but, to date, he has not been afforded same by the Courts of the Commonwealth of Kentucky.

III

The Petition for Certiorari Should Be Granted to Determine Whether Petitioner Was Entitled, Under the Fifth, Sixth and Fourteenth Amendments, to the Assistance of Counsel, to Have Adequate Notice of the Charges, and to an Opportunity to Present a Defense or Matters in Mitigation, Prior to the Pronouncement of Sentence Against Him.

At the conclusion of this trial, Petitioner was summoned before Respondent (Tr. 2288), who then attacked the character and professional qualifications of Petitioner, without giving Petitioner any opportunity to respond thereto whatsoever (Tr. 2288-2290). Respondent then imposed nine counts of unspecified contempt against Petitioner, and summarily directed his bailiffs to remove Petitioner (Tr. 2290), to be confined in prison for fifty-four months (Tr. 2290). At no time was Petitioner permitted to speak (Tr. 2289-2290). When Petitioner *attempted* to speak against the situation of the moment, Respondent threatened to have gags stuffed in his mouth (Tr. 2290), and then ordered his Court policemen to "take him away" (Tr. 2290)! It was not until almost five months later that Petitioner was even advised by this Judge of the specific charges he had been cited for (App., p. 53 of Pet.).

We would urge this Court to decide the question of whether or not due process of law requires that a trial lawyer cited for contempt be given some opportunity to present a defense thereto, or matters in mitigation thereof, before judgment and sentence are

passed. The right to a hearing is a fundamental concept in American law, and included in this concept, necessarily, is the opportunity to speak in one's defense, or in mitigation. *Groppi* v. *Leslie,* 404 U. S. 496, 501 (1972); *In re Oliver,* 333 U. S. 257, 273 (1948); *In re Hammersmith,* 4 Ex. 87, 96, 154 Eng. Rep. 1136, 1140 (1849).

The fact that what is involved is a summary contempt proceeding does not alter the requirement of a hearing being held thereupon. As Mr. Justice Frankfurter said in his dissent in *Sacher* v. *United States,* 343 U. S. 1, at page 30 (1952), in recognizing the need to place the restriction of a hearing upon the summary contempt process:

> "Among the restrictions to be implied, as a matter of course, are two basic principles of our law—that no Judge should sit in a case in which he is personally involved, and that no criminal punishment should be meted out except upon notice and due hearing, unless overriding necessity precludes such indispensable safeguards for assuring fairness and affording the feeling that fairness has been done."

We submit that, in the present case, there did not exist any "overriding necessity" to dispense with notice and hearing. The case was over, and it was certainly a foregone conclusion that Petitioner, a middle-aged, life-long resident of the City of Louisville, with an active law practice, as well as all personal ties, binding him there, was not going to flee to parts unknown.

IV

The Petition for Certiorari Should Be Granted to Determine Whether Petitioner Was Denied His Constitutional Right to a Fair Trial Before an Impartial Judge On the Facts of the Instant Case.

The law is clear that, as an impartial magistrate is an absolute essential to a fair trial, when the Judge himself has been the victim of a personal attack, or even when he wrongly so perceives himself as having been, he should not sit in judgment on his attacker. Being human, he might not remain totally fair and dispassionate. *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971). When the Trial Judge has become "personally embroiled" in controversy with the alleged contemptnor, he should disqualify himself. *Offutt* v. *United States,* 348 U. S. 11 (1954).

It could, perhaps, be well-argued that it is almost too much to ask of any Judge to remain truly fair and open-minded in sitting in judgment over someone who has allegedly committed contemptuous acts before him. *Sacher* v. *United States, supra.* The present case depicts this problem very clearly. The record shows that Respondent's personal feelings towards the Petitioner were intertwined with all of the contempt charges which he leveled against him, and that he genuinely felt that he was being attacked by the Petitioner, whether that was the actual case or not (Tr. 81, 342, 350, 785, 1364, 1507, 1804, 1851, 1992-93). The record further shows that Respondent adopted an adversary posture in regard to Petitioner from the very begin-

ning of the trial (Tr. 348, 546, 1909, 1957). In the records of the United States Supreme Court, for the year 1970, will be found a prior application for extraordinary relief, brought by this lawyer to seek protection from this Judge, that occasion having been grounded on a jail sentence (again for "contempt"), which Respondent imposed on Petitioner for attempting to remove a capital case from his Court to the United States District Court, under the Federal Removal Statute.

The Court is referred to the Petition for Certiorari hereinbefore filed, for the actual language of this Respondent in regard to Petitioner, and indicating this adversary posture which Respondent adopted towards this Petitioner from the beginning of this trial to its conclusion.

All of the foregoing being the case, certainly, under the law, this Respondent should have been disqualified from sitting in judgment over Petitioner as to any contempts purportedly committed by Petitioner against the Court.

CONCLUSION

We respectfully submit that the Petition for Certiorari should be granted because Daniel Taylor, the Petitioner herein, has been denied his basic Constitutional rights, both by the actions of the Respondent herein, and their affirmance by the Kentucky Court of Appeals. Further the impact and scope of this case, upon which review is here sought, is of such impor-

tance and magnitude as to make it a case of national significance, affecting every trial lawyer in the United States.

Wherefore, the Association of Trial Lawyers of America respectfully urges the Supreme Court of the United States to grant the Petition for Certiorari in this case.

Respectfully submitted,

ARTHUR MANDELL

Counsel for Amicus, Association of Trial Lawyers of America

INDEX

PAGE

CITATION TO OPINION BELOW 1

JURISDICTION 1–2

CONSTITUTIONAL PROVISIONS INVOLVED 2

QUESTIONS PRESENTED 2–3

STATEMENT OF THE CASE 3–13

SUMMARY OF ARGUMENT 13–18

ARGUMENT 19–66

I. When the Petitioner Was Sentenced to Serve Consecutive Sentences Aggregating 54 Months' Imprisonment on Multiple Contempt Charges, He Stood Charged with a Serious Offense Within the Meaning of the Sixth Amendment's Guarantee of Trial by Jury, and His Right to a Jury Trial Was Not Affected by the Subsequent Actions of the Trial Judge and Reviewing Court in Modifying the Sentences to a Maximum of Six Months' Imprisonment 19–35

A. This Court has not held and should not hold that where the actual sentence imposed for criminal contempt does not exceed six months' imprisonment, there is no right to trial by jury regardless of other objective criteria reflecting the seriousness of the particular offense 19–23

B. The petitioner was charged with committing a serious offense within the meaning of the trial by jury guarantee 24–29

C. This Court should now consider whether criminal contempt is a serious offense within the meaning of the trial by jury guarantee regardless of the penalty involved 29–33

PAGE

D. This Court should now also consider whether an accused is charged with a serious offense within the meaning of the trial by jury guarantee whenever he faces a possible sentence of imprisonment 33–35

E. In summary, the Petitioner clearly stood charged with a serious offense, entitling him to trial by jury 35

II. The Petitioner Was Deprived of Due Process of Law When the Trial Judge Proceeded Summarily to Find Him Guilty of Contempt and to Impose Punishment 36–58

A. Due process requires that an alleged contemnor be given notice of the charge and the opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed notwithstanding that the alleged contempts have been committed in the presence of the trial judge. 36–41

B. The petitioner was not afforded this right with respect to any of the charges of which he was found guilty 42–47

C. This Court should now consider whether summary punishment for contempt itself is violative of due process of law 47–58

III. In the Circumstances of This Case the Trial Judge Could Not Impartially Sit in Judgment on Multiple Contempt Charges Against the Petitioner 58–66

CONCLUSION 67

AUTHORITIES CITED

Cases: PAGE

Allen v. Illinois, 397 L. S. 337 (1970)..... 56
Anderson v. Dunn, 19 U. S. (6 Wheat.) 204 (1821).53, 57
Arnett v. Meade, Ky., 462 S. W. 2d 940 (1971)..... 27
Argersinger v. Hamlin, 407 U. S. 26 (1972).....33, 34
Baldwin v. New York, 399 U. S. 66 (1970)....19, 20, 21, 23, 33, 34
Baxstrom v. Herold, 383 U. S. 107 (1966)..... 28
Beasley v. Wingo, Ky., 432 S. W. 2d 413 (1968)... 24
Bloom v. Illinois, 391 U. S. 194 (1968).....28, 29, 32, 33, 41, 49, 57, 66
In re Brown, 454 F. 2d 999 (D.C. Cir., 1971)..... 30
Brown v. United States, 356 U. S. 148 (1958)..... 37
Brown v. United States, 359 U. S. 41 (1959)..... 37
Cheff v. Schnackenberg, 384 U. S. 373 (1966).....22, 33
Codispoti v. Pennsylvania, No. 73-5615, this Term.. 29
Colten v. Kentucky, 407 U. S. 104 (1972)..... 28
Cooke v. United States, 267 U. S. 517 (1924)..... 51
In re Dellinger, 461 F. 2d 389 (7th Cir., 1972).....30, 63
In the Matter of Dellinger, 72 Cr. 925, U. S. Dist. Ct., N. D. Ill., Dec. 6, 1973..... 55
District of Columbia v. Clawans, 300 U. S. 617 (1937).....23, 26, 27, 31
District of Columbia v. Colts, 282 U. S. 63 (1930).21, 23, 31
Duncan v. Louisiana, 391 U. S. 145 (1968).....21, 32, 34
Dyke v. Taylor Implement Manufacturing Co., 391 U. S. 216 (1968).....21, 28
Edmunds v. Chang, ____ F. Supp. ____, Crim. No. 73-3926, U. S. Dist Ct., D. Haw., Nov. 2, 1973... 31
Frank v. United States, 395 U. S. 147 (1969)..20, 21, 22, 23, 24, 26, 27, 29, 30, 34
Fuentes v. Shevin, 407 U. S. 65 (1972)..... 37
Goldberg v. Kelly, 397 U. S. 254 (1970)..... 37
Green v. United States, 356 U. S. 165 (1958).....48, 51
Groppi v. Leslie, 404 U. S. 496 (1972).....37, 38, 40

Cases: (Cont'd)

PAGE

Harris v. United States, 382 U. S. 165 (1965)..... 37
Holt v. Virginia, 381 U. S. 131 (1965)..... 63
Interstate Commerce Commission v. Brimson, 154 U. S. 447 (1894)..... 57
Johnson v. Mississippi, 403 U. S. 212 (1971)....39, 49, 59
Levine v. United States, 362 U. S. 610 (1960)..... 37
In re Little, 404 U. S. 553 (1972).....30, 36
Local No. 1667, United Auto Workers v. Kawneer Company, Inc., Ky., 490 S. W. 2d 747 (1973)...20, 28
McBride v. Commonwealth, Ky., 432 S. W. 2d 410 (1968)..... 24
In re McClure, 442 F. 2d 836 (7th Cir., 1971)..... 30
In re McConnell, 370 U. S. 230 (1962).....30, 36
Mayberry v. Pennsylvania, 400 U. S. 455 (1971)...49, 58, 59, 66
In re Michael, 326 U. S. 224 (1945)..... 57
Offutt v. United States, 348 U. S. 11 (1954)..32, 59, 62, 65
In re Oliver, 333 U. S. 257 (1948).....36, 52, 54
Panico v. United States, 375 U. S. 29 (1963)..... 37
Rochin v. California, 342 U. S. 165 (1952)..... 47
Sacher v. United States, 343 U. S. 1 (1952)..41, 46, 51, 54
Shillitani v. United States, 384 U. S. 364 (1966).... 57
Sibron v. New York, 392 U. S. 41 (1968)..... 31
Sniadach v. Family Finance Corporation, 395 U. S. 337 (1969)..... 37
Tauber v. Gordon, 350 F. 2d 943 (3rd Cir., 1965)... 49
Ex parte Terry, 128 U. S. 289 (1888).....39, 40, 47, 53
Tinsley v. Kentucky, No. 73-5786, this Term..... 6
Tumey v. Ohio, 273 U. S. 510 (1927)..... 49
Ungar v. Sarafite, 379 U. S. 575 (1964)..... 63
United States v. Dellinger, 472 F. 2d 340 (7th Cir., 1972)..... 55
United States v. Marshall, 451 F. 2d 372 (9th Cir., 1971)..... 49
United States v. Meyer, 462 F. 2d 827 (D.C. Cir., 1972).....59, 63

Cases: (Cont'd)

PAGE

United States v. Meyer, 346 F. Supp. 973 (D.D.C., 1972) 30, 51

United States v. Oliver, 470 F. 2d 10 (7th Cir., 1972) 30

United States v. Seale, 461 F. 2d 345 (7th Cir., 1972) 20, 29, 37

Ward v. Village of Monroeville, 409 U. S. 57 (1972) 48, 49

Weiss v. Burr, 484 F. 2d 973 (9th Cir., 1973) 39, 40

Constitutional Provisions, Statutes and Rules:

U.S. Const. Amend. VI 2, 13, 15, 19, 20, 22, 24, 29, 31, 32, 35

U.S. Const. Amend. XIV 2, 35

Ky. Const. § 11 28

18 U.S.C. § 1 33

28 U.S.C. § 1257(3) 1

Kentucky Revised Statutes 421.140 27

Kentucky Revised Statutes 431.075 22

Kentucky Revised Statutes 436.020 27

Federal Rule of Criminal Procedure 42(a) 38, 49, 54

Federal Rule of Criminal Procedure 42(b) 39

Other Authorities:

Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice, *The Judge's Role in Dealing with Trial Disruptions* (1971) 38, 39

Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, *Disorder in the Court* (1973) 50, 55, 56

Dobbs, Contempt of Court: A Survey, 56 *Corn. L. Rev.* 183 (1971) 53

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 43-473

DANIEL T. TAYLOR, III, - - - *Petitioner*

v.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE PETITIONER

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Kentucky is reported at 494 S. W. 2d 737, and is printed in the Appendix, *infra,* pp. 5-19.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3), and the petitioner claims that his conviction for criminal contempt was obtained in violation of rights guaranteed to him by the Constitution of the United States. The judgment of the Court of Appeals of Kentucky was entered on March 23, 1973.

A Petition for Rehearing was denied on June 15, 1973. The Petition for a Writ of Certiorari was filed in this Court on September 12, 1973, and the Petition was granted on December 3, 1973.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

QUESTIONS PRESENTED

1. When a trial judge summarily imposes consecutive sentences on eight counts of contempt aggregating four and one-half years' imprisonment, including sentences of one year's imprisonment on two counts, whether he or the appellate court may subsequently, in order to defeat the alleged contemnor's right to trial by jury, reduce the sentences so that the sentence on

no one count exceeds six months' imprisonment and direct that the sentences run concurrently for a total of six months' imprisonment?

2. When alleged contempts have been committed by an attorney in the presence of the trial judge and the trial judge proceeds summarily to punish for contempt, whether due process requires that the attorney be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed?

3. Whether, in the circumstances of this case, the trial judge could impartially sit in judgment on multiple contempt charges against the petitioner?

STATEMENT OF THE CASE*

The petitoner, an attorney, has challenged on constitutional grounds his summary conviction for criminal contempt by the respondent (hereinafter referred to as the trial judge) and the imposition of a sentence, as subsequently modified by the respondent and the Court of Appeals of Kentucky, of six months' imprisonment. The contempt conviction arose out of events occurring during the trial of Narvel and William M. Tinsley on a charge of wilful murder. The petitioner represented Narvel Tinsley, working without pay, during the trial, which was held in the Criminal Branch, Second Division, Jefferson Circuit Court, Louisville,

*References to the transcript of the trial of *Commonwealth* v. *Tinsley* that are not included in the Appendix are indicated by the prefix "Tr." References to the Transcript of Record in *Commonwealth* v. *Tinsley* are indicated by the prefix "R."

Kenutcky, from October 18, 1971, through October 29, 1971. The defendants, young black men, were accused of killing two white police officers. The trial attracted a great deal of press and public attention and was hotly contested.

The petitioner is a well-known and experienced criminal defense and civil rights lawyer in Kentucky. In a career spanning some 20 years he has defended literally hundreds of capital cases, often without pay. His reputation for vigorous, innovative, and effective advocacy was known to the trial judge, himself a former prosecutor.

At the time of the trial the death penalty was still in effect in Kentucky, and the prosecutor publicly announced in advance of the trial that he would seek the death penalty against both defendants. The prosecution anticipated that it would have no problem in the placing of blame as to the killing of one of the officers on William Michael Tinsley, but it had no direct evidence as to the killing of the other officer by either brother. The essence of Narvel's defense would necessarily involve implicating his brother in the shooting of this other officer, and for this reason both the petitioner and Michael's attorneys moved for a severance on the ground that the defenses contemplated by the defendants were totally antagonistic. These motions were denied by the trial judge.

A very important part of Narvel's defense was that the police and public officials realized the weakness of the case against him, and as a result embarked on a propaganda campaign to plant the impression in the

mind of the public (which from their standpoint hopefully would include prospective jurors) that Narvel was guilty of the shooting of the second police officer. There were press conferences and television appearances by police and governmental officials, a widely-publicized "manhunt" for the Tinsley brothers, and a solicitation of funds for the "victims" of the crime by a leading brokerage house in Louisville (App. 5; R. 14-15). Contempts 2, 7, and part of 5 arose from the petitioner's efforts to develop this line of defense (App. 24-25).

The only eyewitness testimony presented by the prosecution was one David Keith White, a black youth who was either with or not with the Tinsley brothers at the time of the shooting, depending on which of his several versions of the event was to be believed. He never testified that he saw Narvel shoot the second officer, gave inconsistent versions of whether he saw Narvel with a gun in his hand, and admitted that he had previously lied to the police in order to escape arrest and would do so again (Tr. 2112). Destroying White's credibility was absolutely crucial to Narvel's defense. Contempt 6 arose from the petitioner's efforts in this respect (App. 25). Throughout the trial the trial judge rigorously controlled all ingress and egress to the courtroom through the use of locked doors, and at one point had the windows overlooking an adjoining area way covered with opaque sheets. All persons entering the courtroom had to submit to a search, including the petitioner's assistants. The front rows of the seating section were reserved for the

mourners of the two slain officers, and understandably they wept at frequent intervals. Numerous armed police officers, both in uniform and plainclothes, were seated among the spectators. At the same time there were often empty seats in the courtroom, but a queque of spectators outside trying to obtain admission (App. 95). At one point the petitioner remonstrated with the trial judge over the exclusion of the spectators, contending that this violated his client's right to a public trial. The trial judge overruled the objection with the observation that: "The courtroom's full enough. If I've got two people out there, there's a public trial as far as I'm concerned." (Tr. 1895). Part of contempt 5 was simply that the Petitioner had made this objection (App. 25).

It is the petitioner's submission that the trial judge, realizing from the outset the weakness of the prosecution's case against Narvel, and determined that in the final tallying there would be "two black lives for two white ones," did absolutely everything that he could to help the prosecution obtain a conviction against Narvel and a verdict of death by electrocution.[1] Beginning with his refusal to sever the trials, and concluding with his effectively instructing the jury to find Narvel guilty of the shooting of the second officer by directing a verdict in favor of Michael as to this death, he tried in every way possible to interfere with the successful presentation of Narvel's defense, and to convey to the jury his firm belief that Narvel was guilty of wilful

[1]The nature and extent of the trial judge's actions in this regard are fully set forth in the Petition for Certiorari filed in *Tinsley* v. *Commonwealth*, No. 73-5768, this Term.

murder and should be sentenced to death. In so doing he was hostile, sarcastic and threatening toward the petitioner and did not attempt to hide his feelings toward the petitioner and his client from the jury. It was in the context of this hotly-contested trial, accompanied by an evident drive by the judge to bring about a conviction, that the petitioner was called upon to represent and protect his client.

The jury voire dire lasted for three days. The first citation of the petitioner for contempt occured during the petitioner's examination of a prospective juror. The trial judge informed the petitioner that he was in contempt for "asking the same question," and stated that he would impose punishment later (App. 30). He then ordered the petitioner and the prosecutor (but not the other lawyers), to file written questions for the voire dire and announced that he was going to take it over. He also modified the contempt citation to a warning (App. 37).

The prosecution began its case on October 21, and concluded on October 25. It presented 14 witnesses, all of whom were permitted to testify without question. Two of the remaining eight citations for contempt occurred during this time. As to these counts, counts 2 and 3 in the "eorrected judgment", the petitioner was permitted to respond "for the record," but this response was intermingled with a discussion of the substantive issues of the case. At no time did the trial judge inform the petitioner as to what the precise charges were, nor did he give the petitioner any meaningful opportunity to respond to the charges.

The presentation of the case for the defendants began on October 26, and continued through October 28. No evidence was presented on behalf of Michael Tinsley. Narvel Tinsley testified in his own behalf. In addition, the petitioner sought to call 21 other witnesses, 9 of whom were summarily prohibited from testifying by the trial judge. Counts 4 through 9 of the contempt charges occurred while the petitioner was attempting to present the defense. There was some discussion in chambers following the citation on count 4, but it had nothing to do with the contempt charge (App. 70-79). As to count 5, the judge cited the petitioner in chambers only while in the process of ruling that a witness whom the petitioner had been examining would not be permitted to testify further (App. 97). He then ordered the petitioner to produce a list of all other witnesses whom he intended to call for the defense, and summarily ruled that 9 of them, all of whom had been properly subpoenaed, would not be permitted to testify (App. 97; 101-106; Tr. 1986-1998).

The intense conflict between the judge and the petitioner flowed directly from the conflict of their objectives. The judge was determined to bring about a conviction. The petitioner was just as equally determined to represent his client within his good-fatih understanding of the permissible parameters of his proper role. Though this Court is not reviewing the question of whether the conduct of the petitioner was, in fact, contemptuous, the conflict between judge and defense counsel is of obvious importance in the Court's consideration of the questions which the Court has ac-

cepted for review. That conflict, and the emanations therefrom, is plainly relevant to the ability of the trial judge to sit impartially in judgment on the multiple contempt charges against the petitioner. It is equally relevant to the question of whether in the case of this type of conflict between a judge and a defense attorney, a jury, rather than simply another judge, should be called upon to adjudicate the issues. Moreoevr, the fundamental unfairness of the type of summary procedure here employed becomes more obvious in the light of the underlying conflict between the judge and the defense attorney against whom he was proceeding. On count 6 the trial judge simply informed the petitioner that he was in contempt, and when the petitioner asked to respond for the record, the trial judge said that he could do so at the next recess (App. 106-107). However, this opportunity did not occur. On count 7 the trial judge permitted the petitioner to make a response for the record, but then directed the court reporter not to put the response in the record (App. 108-109). He specifically refused to permit the petitioner to make a response for the record on count 8 (App. 113). On count 9 he again simply informed the petitioner that he was in contempt (App. 119).

At the conclusion of the trial, after the jury had returned its verdict, finding both defendants guilty and sentencing them to death, but while the jury was still in the box, the following colloquy occurred:

> "The Court: Mr. Taylor, the Court has something to take up with you, sir, at this time.
>
> Mr. Taylor: Well, I'll be right here, Judge.

The Court: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean it's based upon planned confusion.

Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule.—

Mr. Taylor: (Interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself.

Mr. Taylor: I would respond to you, sir—

The Court: (Interrupting) You're not responding to me on anything.

Mr. Taylor: (Interrupting) Oh yes, I will.

The Court: Yes, you're not, either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One—

Mr. Taylor: (Interrupting Unless you intend to gag me—

The Court: (Interrupting) I'll do that—

Mr. Taylor: (Interposing) My lawyers will respond to you—

The Court: (Interposing) I'll do that, sir.

Mr. Taylor: My lawyers will respond to you, sir.

The Court: You be quiet, or you'll—there will be some more contempts—

Mr. Taylor: (Interrupting) No, you heard what I said.

The Court: I have you on nine counts. First Count, 30 days in jail; Second Count, 60 days in jail, Third Count, 90 days in jail; Fourth Count, six months in jail; Fifth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

Take him away.

Mr. Taylor: We will answer you in court.

The Court: I'd be glad to see you" (App. 28-29).

At the conclusion of his colloquy, the petitioner was placed in the custody of peace officers and taken to the Louisville City Jail. The trial judge refused to make himself available to petitioner's counsel for the purpose of setting bail, and a bail hearing had to be ordered by the Court of Appeals of Kentucky. The trial judge refused to allow the petitioner to be present at the hearing, and also denied bail. Bail was finally ordered by the Kentucky Court of Appeals, and the

petitioner filled same, and was released. On November 4, 1971, the trial judge entered an order prohibiting the petitioner from "further practice of law in this Court."

After the petitioner had filed his appeal in the Court of Appeals of Kentucky, the trial judge, on February 8, 1972, over three months after the trial had ended, moved the Court of Appeals for permission to correct the judgment, and his motion was granted over the objection of the petitioner. In the corrected judgment the trial judge stated that the first count of contempt should be changed to a warning, and he reduced the sentence of one year's imprisonment imposed on count 8 and on count 9 to a sentence of six months' imprisonment on each count. He then set forth the sentences on each of the remaining counts, six of which were punished by six months in jail, one of which was punished by 60 days in jail and one of which was punished by 90 days in jail. He did not specifically state that the sentences were to run consecutively, as he did when imposing sentence from the bench, but he also did not state that they were to run concurrently (App. 29).

In his appeal to the Kentucky Court of Appeals the petitioner raised all issues covered in the grant of certiorari (App. 4), as well as other constitutional and state law questions. The Court of Appeals held that the order prohibiting the petitioner from the practice of law in the Second Division was improper under state law and set it aside. With respect to the petitioner's contention that he was entitled to a jury trial on the

contempt charges, the Court of Appeals held that the sentences should now be served concurrently rather than consecutively, and that since the total sentence would not then exceed six months, the petitioner was not entitled to a jury trial. In all other respects it affirmed the conviction and rejected the petitioner's constitutional contentions. Petitioner's Petition for Rehearing to the Court of Appeals was denied on June 15, 1973, without comment. Certiorari was granted by this Court on December 3, 1973. On September 19, 1973, Mr. Justice Stewart issued an order staying enforcement of the judgment of the state court pending disposition of the case by this Court.

SUMMARY OF ARGUMENT

I. When the petitioner was sentenced to serve consecutive sentences aggregating 54 months' imprisonment, he stood charged with a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee, and it is irrelevant that his sentence was subsequently modified to a maximum of six months' imprisonment. This Court has not adopted and should not adopt a "six month rule" in criminal contempt cases, upholding the denial of the right to trial by jury where the actual sentence imposed, including by retroactive amendment if necessary, does not exceed six months regardless of other objective criteria reflecting the seriousness of the particular offense. Even if this Court were to adopt a "six month rule," the entitlement to a jury trial should attach at the time the sentence is originally imposed, and the right to a jury trial should

not be able to be defeated as it was here, by subsequent modification of the sentence on the part of the trial judge or the reviewing court.

By imposing the extraordinarily severe sentence that he did, the trial judge necessarily "certified" that the petitioner was charged with having committed a very serious offense. The Kentucky Court of Appeals, while holding in one portion of its opinion that the petitioner was only charged with a "petty" offense within the meaning of the trial by jury guarantee, in another portion of its opinion attacked the petitioner's character in the most opprobrious terms and accused him of planning to disrupt the trial and by any means possible to cause the trial judge to commit reversible error.

In Kentucky, observing "the laws and practices of the community taken as a gauge of its social and ethical judgments," criminal contempt is considered a serious offense. Since the right to trial by jury may depend on the seriousness with which a particular state regards the offense, the right to trial by jury should attach to alleged criminal contempts committed before the Kentucky courts when a substantial period of imprisonment is imposed as punishment.

This Court should now consider whether criminal contempt is a serious offense within the meaning of the trial by jury guarantee regardless of the penalty involved. Because conduct that can be made punishable as criminal contempt must have the effect of actually interfering with the administration of justice, criminal contempt is an offense which is likely to be regarded as

contrary to the "social and ethical judgments of the community." Moreover, the nature of the offense necessarily involves a confrontation between the accused and the court, and the "appearance of justice" is not satisfied when judges, without the intervention of a jury, pass on charges of criminal contempt.

The Court should also consider whether the possibility of any imprisonment is sufficient to entitle an accused to a jury trial. The "different geneology" of the right to trial by jury should not set it apart from the other guarantees of the Sixth Amendment, which do not depend for their application on the extent of possible imprisonment faced by the accused.

II. The petitioner was deprived of due process of law when the trial judge proceeded summarily to find him guilty of contempt and to impose punishment. Due process should require that an alleged contemnor, like any other defendant, be given notice of the charge and an opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed. It is immaterial that the alleged contempt was committed in the presence of the trial judge, since the trial judge may be persuaded that he has perceived the facts inaccurately, or that the conduct for which he has cited was not contemptuous, or that an intention to obstruct the administration of justice was lacking. The right to notice of the charge and the opportunity to be heard is clearly required where, as here, the trial judge did not cite and simultaneously punish for contempt in order to restore courtroom decorum or the like. However, no exception should be made for contempts arising

out of courtroom disruption, since regardless of the time at which the trial judge acts or his motivation for so doing, he is still finding a person guilty of a criminal offense and imposing punishment.

The right for which the petitioner is contending should be construed to encompass a statement of the precise charge and the facts giving rise to that charge, the opportunity to be heard in defense or mitigation, including where necessary, the right to present extrinsic evidence, a ruling on guilt or innocence, and the imposition of punishment if the contemnor is found guilty.

The petitioner was not afforded this right with respect to any of the charges of which he was found guilty. While the petitioner was permitted to respond for the record on two of the eight charges, the trial judge made it clear that his mind was made up about the petitioner's guilt as soon as he cited the petitioner for contempt on those charges. The trial judge did not hold a *hearing* on any of the charges in the sense of separating the contempt charge from the other matters involved in the trial, stating the precise charge and the facts giving rise to that charge, indicating that he was prepared to listen objectively to arguments in defense or mitigation, and so doing, and ruling on the petitioner's guilt or innocence.

The Court should now consider whether summary punishment for contempt itself is violative of due process of law. Summary punishment for contempt, which combines the otherwise inconsistent functions of lawmaker, prosecutor, judge, and jury in a single individual who is necessarily involved in the events

leading up to the charge, is contrary to the fundamental premises upon which the concept of due process of law is based. Neither the "judicial economy" or "preserving order" justification can be considered sufficient to sanction this "anomaly in the law." Even though the trial judge has witnessed the alleged contempt, he may still be mistaken as to the actual facts and as to whether the conduct of the alleged contemnor amounted to criminal contempt, which is demonstrated by the numerous reversals of summary contempt convictions by appellate courts. The "preserving order" justification is completely undercut when the trial judge waits until the end of the trial to punish for contempt, and at a minimum this Court should hold that due process prohibits the exercise of the summary contempt power after the trial has terminated and in any case where such exercise is not shown to have been necessary for the purpose of preserving order in the courtroom. However, the exercise of the summary contempt power cannot be justified even where purportedly necessary to prevent courtroom disruption, since there are numerous other methods the trial judge can employ to prevent disruption, that are not subject to the abuses of the exercise of the summary contempt power.

III. In the circumstances of this case the trial judge could not impartially sit in judgment on multiple contempt charges against the petitioner. All four elements of "embroilment in controversy" were clearly present, and the holding of the Kentucky Court of Appeals to the effect that the trial judge could impartially sit in judgment on the contempt charges is

truly astonishing. The record clearly shows that the trial judge was an "activist seeking combat," that he perceived himself as the victim of a "personal attack," that he was charged by the petitioner with bias and unfairness, and that he had adopted an adversary posture with respect to the petitioner. The animus and hostility of the trial judge toward the petitioner and his obvious lack of impartiality fairly "scream out" from the record, and are manifested by his statements and actions throughout the trial, culminating in his behavior at the conclusion of the trial when he not only accused the petitioner of improper motives, not only criticized the bar association for not having disciplined the petitioner "years ago," not only said that he wanted the members of the jury and the law students "of the community" to hear his remarks, but refused to allow the petitioner to speak a word in his defense, threatened to gag him and impose more contempts if he persisted in trying to do so, and directed the bailiff to "take him away."

The conviction of the petitioner must be reversed, if for no other reason, than that he was denied the right to trial before an unbiased judge.

ARGUMENT

I.

When the Petitioner Was Sentenced to Serve Consecutive Sentences Aggregating 54 Months' Imprisonment on Multiple Contempt Charges, He Stood Charged with a Serious Offense Within the Meaning of the Sixth Amendment's Guarantee of Trial by Jury, and His Right to a Jury Trial Was Not Affected by the Subsequent Actions of the Trial Judge and Reviewing Court in Modifying the Sentences to a Maximum of Six Months' Imprisonment.

A. This Court has not held and should not hold that where the actual sentence imposed for criminal contempt does not exceed six months' imprisonment, there is no right to trial by jury regardless of other objective criteria reflecting the seriousness of the particular offense.

When the trial judge ordered the peace officers to "take him away," the petitioner faced a prison sentence of 54 months' imprisonment, including one year on each of two counts. As the trial judge subsequently realized, he could not, without the intervention of a jury, impose a sentence of one year's imprisonment on a single count, *Baldwin* v. *New York,* 399 U. S. 66 (1970), and as he specifically stated, in order that the petitioner's right to trial by jury not come into play, he reduced the sentences on those two counts to six months each (App. 27). Assuming that the sentences were to run consecutively, and with the first count dropped, the petitioner then faced 41 months' imprisonment, and he argued before the Kentucky Court of Appeals that such a sentence could not be imposed without the intervention of a jury.

While the petitioner's case was pending, the Kentucky Court of Appeals held in another case that there could not be imprisonment for more than six months for contempt of court "except upon the unanimous verdict of a jury under instructions including the reasonable doubt protection as in comparable criminal cases." *Local No. 1667, United Auto Workers* v. *Kawneer Company, Inc.*, Ky., 490 S. W. 2d 747 (1973). Under this approach, it necessarily followed that separate sentences for contempt had to be aggregated for the purpose of determining the alleged contemnor's right to a jury trial. *C.f. United States* v. *Seale*, 461 F. 2d 345 (7th Cir., 1972). In order to bring the petitioner's case within the "six month rule," the Court of Appeals gratuitously directed that the petitioner's sentences be served concurrently rather than consecutively (App. 20). It also read this Court's decisions in *Frank* v. *United States*, 395 U. S. 147 (1969), and *Baldwin* v. *New York, supra*, as setting forth a constitutional "six month rule" and holding that where the actual penalty imposed for criminal contempt, including by retroactive modification if necessary, did not exceed six months, there was no right to a jury trial regardless of other objective criteria reflecting the seriousness of the particular offense. It is submitted that this Court has not set forth any "six month rule" as determinative of the right to trial by jury in cases of criminal contempt, and that where a person has been charged with committing a serious criminal contempt, the Sixth Amendment's guarantee of trial by jury applies irrespective of the penalty that is actually imposed.

In looking for "objective indications of the seriousness with which society regards an offense," *Frank* v. *United States, supra* at p. 148, this Court has found the most relevant criterion to be the severity of the maximum authorized penalty rather than the penalty actuallly imposed, *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), and in *Baldwin* v. *New York, supra,* it held that where the maximum authorized penalty exceeded six months, the defendant was constitutionally entitled to a jury trial. It has also held that the right to a jury trial may depend on the nature of the offense itself, and that a particular offense may be regarded as sufficiently serious to entitle the defendant to a jury trial, even though the maximum authorized penalty is relatively small. *District of Columbia* v. *Colts,* 282 U. S. 63 (1930).

The same principles are presumably applicable to determine the right to a jury trial on the part of a person charged with criminal contempt. Where the maximum penalty for criminal contempt has been prescribed by statute, this Court has looked to the statutory authorization for the purpose of determining whether this was a serious offense, entitling the alleged contemnor to a jury trial. *Dyke* v. *Taylor Implement Manufacturing Co.,* 391 U. S. 216 (1968); *Frank* v. *United States, supra* at p. 149, n. 2. However, in a number of states the legislature has not placed any limits on the courts' power to punish for contempt. It could be contended that since, in the absence of a statutorily authorized maximum punishment or a general statutory provision prescribing the punishment for

offenses for which no penalty is otherwise provided, see *e.g.*, Ky. Rev. Stat. 431.075, an alleged contemnor is subject to the most severe punishment that the state can impose for any offense, criminal contempt is necessarily a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee. Admittedly this has not been the approach that this Court has taken to entitlement to a jury trial in cases of criminal contempt, and where there is no maximum authorized punishment, this Court has stated that, "The severity of the penalty actually imposed is the best indication of the seriousness of the particular offense." *Frank* v. *United States, supra* at p. 149.

However, although this court has upheld sentences for criminal contempt of up to six months, *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966), it has not held that there is a "six month rule," nor has it held that while the severity of the penalty actually imposed may be the best indication of the seriousness of the particular offense, it is the *only* indication. It definitely has not held that so long as the penalty actually imposed, including by retroactive modification if necessary, does not exceed six months, there is no right to a jury trial regardless of other objective indications showing that *particular charges of criminal contempt in particular circumstances* involved a "serious offense" within the meaning of the trial by jury guarantee.

Moreover, even the maximum authorized penalty has not been treated as determinative of the seriousness of a particular offense. Its relevance is only that it

may be "taken as a gauge of [the] social and ethical judgments of the community," *District of Columbia* v. *Clawans*, 300 U. S. 617, 628 (1937), and even though the maximum authorized penalty is relatively small, the "social and ethical judgments of the community" may dictate that the particular offense is a serious one within the meaning of the trial by jury guarantee. *District of Columbia* v. *Colts, supra.* ("Driving recklessly as to endanger persons and property" was serious offense, although maximum authorized punishment was a fine of $100 and 30 days' imprisonment). It is clear that both the maximum authorized penalty and the nature of the particular offense must be looked to in order to determine whether the offense is a serious one within the meaning of the trial by jury guarantee. *Baldwin* v. *New York, supra* at p. 69, n. 6. Especially in the case of criminal contempt, which as this Court has said, covers "a great many different type of offenses, ranging from disrespect to the court to acts otherwise criminal," *Frank* v. *United States, supra* at p. 149, the nature of the particular offense is of the utmost importance in determining whether the alleged contemnor has been charged with a serious offense so as to be entitled to trial by jury. Where, in the circumstances of a particular case, and in light of the "social and ethical judgments of the community," there are objective indications that a particular contempt is a "serious" one, the alleged contemnor is entitled to a trial by jury notwithstanding that the final penalty imposed does not exceed six months' imprisonment.

B. The petitioner was charged with committing a serious offense within the meaning of the trial by jury guarantee.

In the circumstances of this case and in light of the "social and ethical judgments of the community," the petitioner was clearly charged with committing a serious offense within the meaning of the Sixth Amendment's guarantee of trial by jury. Indeed, if the severity of the penalty imposed is the best indication of the seriousness of the particular offense, *Frank* v. *United States, supra,* the petitioner certainly stood charged with committing a serious offense when the trial judge imposed consecutive sentences aggregating 54 months' imprisonment, including one year on each of two counts. The only reason that the sentence was subsequently modified and the separate counts were ordered to run concurrently was to defeat the petitioner's claim of entitlement to trial by jury. In his "corrected judgment" the trial judge specifically stated that this was why he was reducing the one year sentences to six months each (App. 20). Likewise, the Kentucky Court of Appeals stated that the sentences *must* be served concurrently, and then held that since they would be served concurrently, the petitioner was not entitled to a jury trial.[2] More significantly, by imposing the extraor-

[2]In so holding, the Court either disregarded or overruled *sub silento* its previous holdings to the effect that whether sentences were to run consecutively or concurrently was in the exclusive discretion of the trial judge, *McBride* v. *Commonwealth,* 432 S. W. 2d 410 (1968), and that if the judgment does not provide otherwise, multiple sentences are construed to run consecutively. *Beasley* v. *Wingo,* Ky., 432 S. W. 2d 413 (1968). It is also interesting to

(Footnote continued on following page)

dinarily severe sentence that he did, the trial judge necessarily "certified" that the petitioner was charged with having committed a very serious offense. The seriousness of the purported offense in the eyes of the trial judge is further evidenced by his extreme statements from the bench at the time he sentenced the petitioner, his refusal to admit the petitioner to bail pending appeal or even to hold a bail hearing until ordered to do so by the Court of Appeals, and his entry of an invalid order prohibiting the petitioner from the practice of law in "his court."

The Court of Appeals, while holding that the petitioner had only been convicted of a "petty" offense within the meaning of the trial by jury guarantee, said of the allegedly contemptuous conduct that it was "such as to place on trial the entire judicial system of the Commonwealth and those judges sworn to uphold its Constitution and laws and thereby assure defendants a fair, orderly and speedy trial" (App. 9). It attacked the petitioner's character in the most opprobrious terms, accusing him of "embarking upon a plan or program designed to disrupt the trial and by any means possible cause the trial court to commit trial errors which might form the basis of an appeal," and of creating an atmosphere in the court in which he "would

---

note that while the trial judge originally argued that he had the power to impose sentences aggregating 41 months' imprisonment so long as the sentence on no one count exceeded six months (Brief for Respondent-Appellee in Taylor v. Hayes, pp. 2, 17), in response to the arguments put forth in the Petition for Rehearing, he stated that he had intended to limit the total sentence to six months in the corrected judgment. (Response to Petition for Rehearing in Taylor v. Hayes, p. 1).

have appeared to be the star performer in the center ring of a three-ring circus" (App. 8). The petitioner, of course, would most vigorously dispute these charges, which are totally unsupported by the record, and would contend that he did nothing more than zealously defend the rights of his client charged with a capital offense. But it is utterly incongruous for the Court of Appeals in one portion of the opinion to attack the petitioner's character and conduct in this most opprobious way and in another portion of the opinion to hold that he was only charged with a "petty" offense within the meaning of the trial by jury guarantee. The characterization of the petitioner's conduct in this way, coupled with the severity of the sentence originally imposed, certainly supplies the "objective criteria reflecting the seriousness of the offense," *Frank* v. *United States, supra,* within the meaning of the trial by jury guarantee. The petitioner was clearly charged with "serious contempt," and was therefore, entitled to a trial before a jury on the charges.

The seriousness of an offense for purposes of entitlement to trial by jury may also be "observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." *District of Columbia* v. *Clawans, supra* at p. 628. It is quite clear that in Kentucky criminal contempt is considered a serious offense. The Kentucky legislature has indicated its view in this regard by limiting the punishment that can be imposed for contempt without the intervention of a jury to a maximum fine of $30 and

imprisonment for 24 hours in the case of contempt by a recalcitrant witness, Ky. Rev. Stat. 421.140, and in all other cases of contempt to a maximum fine of $30 and imprisonment for 30 hours. Ky. Rev. Stat. 436.020. In so doing, it has "included within the definition of the crime itself a judgment about the seriousness of the offense." *Frank* v. *United States, supra* at p. 149. In *Arnett* v. *Meade,* Ky., 462 S. W. 2d 940 (1971), the Kentucky Court of Appeals, declared Ky. Rev. Stat. 421.140 unconstitutional under state law as an interference with the judicial function, and in the case at bar it declared Ky. Rev. Stat. 436.020 unconstitutional for the same reason (App. 18). In *Arnett* it observed that: "Some elements of our society are fomenting disrespect for the courts and encouraging contemptuous conduct. The courts are confronted with a serious threat to the structure of our system of justice. Dollar and time limits suitable for conditions of the previous century are not adequate for the conditions of today." 462 S. W. 2d at 948. The legislative determination that contempt is a serious offense, as set forth in the above statutes, and the invalidation of those statutes by the Court of Appeals because it saw criminal contempt as constituting a "serious threat to the structure of our system of justice," show that in light of the "laws and practices of the community taken as a gauge of its social and ethical judgments," *District of Columbia* v. *Clawans, supra,* criminal contempt is considered a serious offense in Kentucky. Since the right to trial by jury may depend on the seriousness with which a particular state regards the offense, as reflected by the

maximum punishment it has authorized, *Dyke* v. *Taylor Implement Manufacturing Co., supra,* the right to trial by jury should attach to alleged criminal contempts committed before the Kentucky courts when a substantial period of imprisonment is imposed as punishment.[8]

Assuming that this Court has not promulgated a "six month rule," and that an offense may be regarded as a serious one in light of other objective criteria reflecting the seriousness of the offense even though the punishment actually imposed does not exceed six months, the petitioner was clearly charged with committing a serious offense within the meaning of the trial by jury guarantee.

Even if this Court were to adopt a "six month rule" and ignore other objective criteria reflecting the seriousness of the offense so long as the sentence imposed did not exceed six months, the entitlement to a jury trial should attach at the time the sentence is originally imposed, and the right to a jury trial should not be able

[8]With the invalidation of the statutes in question, there is no right to a trial by jury in criminal contempt cases in Kentucky unless the punishment imposed exceeds six months. *Local No. 1667, United Auto Workers* v. *Kawneer Co., Inc., supra.* In all other criminal cases tried before the Circuit Court, whether in the exercise of its original jurisdiction, or on *de novo* review of the judgment of an inferior court, see *Colten* v. *Kentucky,* 407 U. S. 104 (1972), there is the right to trial by jury irrespective of the maximum penalty that can be imposed. Ky. Const. § 11. The right to trial by jury is also generally provided for by statute in the inferior courts. *Colten* v. *Kentucky, supra,* at 113. Since Criminal contempt is like other crimes insofar as the right to trial by jury is concerned, *Bloom* v. *Illinois,* 391 U. S. 194, 210 (1968), the disparate treatment in Kentucky of defendants charged with criminal contempt with respect to the right to trial by jury under state law raises serious equal protection questions. *C.f. Baxstrom* v. *Herold,* 383 U. S. 107 (1966).

to be defeated, as it was here, by subsequent modification of the sentence on the part of the trial judge or the reviewing court to bring it within a "six month rule."[4] The imposition of sentences aggregating 54 months' imprisonment, including one year on each of two counts, showed by its severity, *Frank* v. *United States, supra,* that the petitioner was charged with committing a serious offense within the meaning of the trial by jury guarantee, and no subsequent modification of the sentence (particularly when coupled with a characterization of the petitioner's conduct in the most opprobrious terms possible) can alter this "objective indication."

C. This Court should now consider whether criminal contempt is a serious offense within the meaning of the trial by jury guarantee regardless of the penalty involved.

It is respectfully submitted that this Court should now reconsider its view to the effect that, "Criminal contempt is not a crime of the sort that requires the right to a jury trial regardless of the penalty involved," *Bloom* v. *Illinois,* 391 U. S. 194 (1968), and that it should hold that criminal contempt is indeed a serious offense within the meaning of the Sixth Amendment's

[4]Since the Kentucky Court of Appeals requires that separate sentences for contempt be aggregated for purposes of determining entitlement to a jury trial, the case at bar does not present directly the question presented in *Codispoti* v. *Pennsylvania,* No. 73-5615, this Term, as to whether separate sentences must be aggregated for purposes of determining Sixth Amendment entitlement to a jury trial. However, the abuses that can result from permitting trial judges to "parcel out" sentences for separate counts of contempt, as discussed in *United States* v. *Seale,* 461 F. 2d 345, 353-356 (7th Cir., 1972), are clearly illustrated here.

trial by jury guarantee. The justification for holding that all contempts are-not serious offenses has been that, "A person may be found in contempt of court for a great many different types of offenses, ranging from disrespect for the court to acts otherwise criminal." *Frank* v. *United States,* 395 U. S. 147, 149 (1969). However, this justification must be reevaluated in light of present views as to what conduct may constitutionally be punishable as criminal contempt on the ground that it has "blocked the trial judge in the performance of his judicial duty." *In re McConnell,* 370 U. S. 230 (1962). It is now unmistakably clear that mere disrespect toward the person of the trial judge cannot be punishable as criminal contempt and that improper statements may not be treated as contemptuous unless they have actually disrupted the court proceedings. *In re Little,* 404 U. S. 553 (1972). In a number of cases conduct perceived by the trial judge as contemptuous has been held insufficient to constitute the offense when reviewed by appellate courts or by another "less involved" judge. See *e.g., United States* v. *Oliver,* 470 F. 2d 10 (7th Cir., 1972); *In re Dellinger,* 461 F. 2d 389 (7th Cir., 1972); *In re Brown,* 454 F. 2d 999 (D.C. Cir., 1971); *In re McClure,* 442 F. 2d 836 (7th Cir., 1971); *United States* v. *Meyer,* 346 F. Supp. 973 (D.D.C., 1972). In light of these developments, conduct that can be made punishable as criminal contempt will usually be conduct of a "serious" nature, as that term is commonly understood, and because such conduct must have the effect of actually interfering with the administration of justice, it is likely to be regarded

as contrary to the "social and ethical judgments of the community," *District of Columbia* v. *Clawans,* 300 U. S. 617, 628 (1937), in a society in which the fair and orderly administration of justice is held in high regard. The seriousness of a charge of criminal contempt against an attorney is magnified because of the collateral consequences, such as disbarment or other discipline, that may result from a contempt conviction. *C.f. Sibron* v. *New York,* 392 U. S. 41 (1968).[5] Today, it is very unlikely that a person may constitutionally be convicted of criminal contempt except for engaging in conduct which in most situations would be regarded as extremely serious by the society as a whole. For this reason, it is submitted that regardless of the penalty that is authorized or imposed, a person charged with criminal contempt is charged with a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee, and that in the case of criminal contempt it is the nature of the offense rather than the penalty that should be determinative of the right to a jury trial. *C.f. District of Columbia* v. *Colts,* 282 U. S. 63 (1930).

Another reason why a prosecution for criminal contempt should entitle the alleged contemnor to a jury

[5]In the recent case of *Edmunds* v. *Chang,* ____ F. Supp. ____, Crim. No. 73-3926, U. S. Dist. Ct., D. Haw., Nov. 2, 1973, the Court, in holding that an attorney convicted of contempt and sentenced to pay a $25 fine, could challenge the validity of his conviction in an habeas corpus action, observed that: "An attorney's reputation is his principal professional asset; the success of his efforts often depends on a delicate balance of harmony with the courts. A judgment of criminal contempt is something far more than a mere 'moral restraint' to one who occupies the status of an officer of the court." (Slip opinion, p. 5).

trial is that the nature of the offense necessarily involves a confrontation between the accused and the court. By denying the right to a jury trial in any case of criminal contempt, the courts are, in effect, sitting in judgment on their own actions. Justice "must satisfy the appearance of justice, "*Offutt* v. *United States,* 348 U. S. 11, 14 (1954), and the appearance of justice is not satisfied when judges pass on charges of "contempt of court." This principle was seemingly recognized in *Bloom* v. *Illinois,* 391 U. S. 194, 202 (1968), where this Court observed:

> "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court."

If the Sixth Amendment's guarantee of trial by jury truly does reflect a "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges," *Duncan* v. *Louisiana,* 391 U. S. 145, 156 (1968), there is no case more appropriate for the invocation of that guarantee than a prosecution for criminal contempt. This is particularly so, since it is now recognized that submitting contempt cases to juries will not "handicap the effec-

tive functioning of the courts." *Bloom* v. *Illinois*, *supra*, at p. 209. The constitutional right of trial by jury, it is submitted, should extend to all cases of criminal contempt.

D. This Court should now also consider whether an accused is charged with a serious offense within the meaning of the trial by jury guarantee whenever he faces a possible sentence of imprisonment.

It is respectfully submitted that this Court should now also reconsider the question of whether any offense punishable by a period of imprisonment is beyond the pale of the trial by jury guarantee. In *Baldwin* v. *New York*, 399 U. S. 66 (1970), the Court held that an offense could not be considered petty when the authorized punishment exceeded six months, but it also intimated there and has held in cases such as *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), that a person could be imprisoned for up to six months without being entitled to a jury trial. In *Cheff* the Court relied heavily on the statutory definition of a "petty offense" contained in 18 U.S.C. § 1. However, in *Argersinger* v. *Hamlin*, 407 U. S. 26 (1972), the Court rejected such a distinction with respect to the right to counsel and specifically held that the right to counsel attached whenever the accused faced the possibility of any period of imprisonment.

In *Argersinger*, the Court distinguished the right to trial by jury from the right to the assistance of counsel only on the ground that there was "historical support" for limiting the right to trial by jury to "serious cases."

Supra at p. 30. It is respectfully submitted that the possibilty of imprisonment for any period of time makes the offense a serious one within the meaning of the trial by jury guarantee. As the Court observed in *Baldwin* v. *New York, supra* at p. 73, "Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation." In *Baldwin* the Court suggested that the "onerous disadvantages" resulting from imprisonment had to be weighed against the benefits that resulted from "speedy and inexpensive non-jury adjudications" when the right to trial by jury was claimed in prosecutions carrying no more than a six month sentence. 399 U. S. at 73. It is respectfully submitted that neither the "different geneology" of the right to trial by jury nor the "balance of convenience" test justifies denial of the right to trial by jury when an accused faces the possibility of imprisonment for any period of time. Just as the assistance of counsel may be no less necessary for a fair trial in a prosecution where the penalty authorized does not exceed six months, *Argersinger* v. *Hamlin, supra* at p. 33, the nature of the right to trial by jury as fundamental to our system of justice, *Duncan* v. *Louisiana,* 391 U. S. 145, 153-157 (1968), does not differ depending on the extent of the possible imprisonment that is involved. This Court should now hold, as Mr. Justice Black, joined by Mr. Justice Douglas, contended in *Frank* v. *United States,* 395 U. S. 147, 159-160 (1969), that when the government can

impose a penalty of imprisonment for any period of time, it has not charged a person with a petty offense, and that person is entitled to be tried by a jury of his peers before he can be sent to prison.

E. In Summary, the Petitioner clearly stood charged with a serious offense, entitling him to trial by jury.

The petitioner asks this Court to hold that since he faced the possibility of imprisonment for contempt, he was charged with a serious offense within the meaning of the trial by jury guarantee. In this regard, it is both the nature of the offense and the fact that he faced the possibility of imprisonment that, he contends, entitles him to this right. He further contends that even if the guarantee of trial by jury does not extend to all cases where a defendant faces imprisonment or to all charges of criminal contempt, in the circumstances of this case, and in light of the "social and ethical judgments of the community," he was charged with a serious offense within the meaning of the trial by jury guarantee, and that the denial of that right to him was violative of the Sixth and Fourteenth Amendments.

II.

The Petitioner Was Deprived of Due Process of Law When the Trial Judge Proceeded Summarily to Find Him Guilty of Contempt and to Impose Punishment.

A. Due process requires that an alleged contemnor be given notice of the charge and the opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed notwithstanding that the alleged contempts have been committed in the presence of the trial judge.

If reasonable notice of a charge and the opportunity to be heard in defense are "basic to our system of jurisprudence," *In re Oliver*, 333 U. S. 257, 273 (1948), it is difficult to see why they are not equally basic in proceedings where a trial judge acts summarily to punish for contempt. While the trial judge may have witnessed the conduct giving rise to the charge, he is not infallible and hopefully is not impervious to being persuaded that he perceived the facts inaccurately. More importantly, he may be mistaken in his view that the conduct constituted criminal contempt. If the alleged contemnor is given notice of the precise charge and an opportunity to be heard, he may succeed in persuading the trial judge that the conduct for which he was cited was not contemptuous, because it did not "block the trial judge in the performance of his judicial duty," *In re McConnell*, 370 U. S. 230 (1962), or did not in any way disrupt the court proceedings. *In re Little*, 404 U. S. 553 (1972). And when the basis for the contempt charge is alleged "disrespect," the trial judge may on reflection realize that he has confused "offense to his sensibilities with obstruction to the

administration of justice." *Brown* v. *United States,* 356 U. S. 148, 153 (1958). A hearing is also necessary to determine if a crucial element of the offense, intention to obstruct, see *e.g., United States* v. *Seale,* 461 F. 2d 345, 367-369 (7th Cir., 1972), was present, a principle that this Court has clearly recognized in cases where the alleged contemnor's state of mind or mental condition was specifically put in issue. *Panico* v. *United States,* 375 U. S. 29 (1963); *Harris* v. *United States,* 382 U. S. 165 (1965). Finally, if for no other reason, a hearing is necessary so that the contemnor may plead matters in mitigation, of which the trial judge may have been unaware. It must be assumed that the trial judge will change his mind and reconsider his ruling if persuaded that he acted erroneously. See the discussion in *Groppi* v. *Leslie,* 404 U. S. 496, 506, n. 11 (1972); *Levine* v. *United States,* 362 U. S. 610, 613-614 (1960); *Brown* v. *United States,* 359 U. S. 41, 52 (1959).

The importance of notice and the right to be heard when the trial judge is proceeding summarily to punish for contempt is underscored by the numerous decisions of this Court holding that persons may not be deprived of property rights or governmental benefits in the absence of notice and hearing. See *e.g., Fuentes* v. *Shevin,* 407 U. S. 65 (1972); *Goldberg* v. *Kelly,* 397 U. S. 254 (1970); *Sniadach* v. *Family Finance Corporation,* 395 U. S. 337 (1969). Surely, a person charged with a criminal offense is entitled to the same guarantees of due process, and since it cannot be assumed that judges are or can be permitted to be impervious to

argument or explanation, it is completely immaterial that the judge himself witnessed the acts giving rise to the charge. Fundamental principles of due process prohibit the conviction of a person for a criminal offense where that person has not been given notice of the charge against him and the opportunity to be heard in defense or mitigation.

As emphasized in the Petition for Certiorari (pp. 15-19), this Court has not heretofore been specifically presented with the question of whether due process requires that an alleged contemnor must be given notice of the charge against him and an opportunity to be heard before he is finally adjudged guilty of the offense and punishment is imposed. Nor does Federal Rule of Criminal Procedure 42(a) specifically provide for notice and the opportunity to be heard when the judge is proceeding summarily to punish for contempt. Nonetheless, as this Court has pointed out, where the trial judge acts summarily to punish for alleged contempts committed in his presence, "[t]he contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi* v. *Leslie, supra* at p. 504. This right, it is submitted, goes to the essence of due process of law and is constitutionally required rather than being, as the respondent here has argued, "a matter of grace."

The necessity of notice and an opportunity to be heard was recognized by the Advisory Committee on the Judge's Function of the American Bar Association Project on Standard for Criminal Justice. The Advance Report of the Committee states as follows:

"F.4 Notice of charges and opportunity to be heard

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

Commentary

Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte Terry,* 128 U. S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course. Nothing in this standard, however, implies that a plenary trial of contempt charges is required."[6] Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice, *The Judge's Role in Dealing with Trial Disruptions,* p. 20 (1971).

The language in *Terry* "reflects the spirit of an earlier time, when courts were less sensitive to the compelling nature of procedural due process guarantees." *Weiss* v. *Burr,* 484 F. 2d 973, 986, n. 25 (9th Cir. 1973). In this day and age it is constitutionally unthinkable that a person could be sent to prison without being

[6]Assuming that this Court continues to uphold the power of judges to punish summarily for contempt, it necessarily follows that the nature of the hearing afforded in such proceedings will differ from the full-scale hearing that is required when the court is not proceeding summarily. See *Johnson* v. *Mississippi,* 403 U. S. 212 (1971); Federal Rules of Criminal Procedure 42(b).

given notice of the charge against him and the opportunity to be heard in his own defense.

In the case at bar the trial judge did not cite and simultaneously punish the petitioner for contempt in order to restore courtroom decorum or the like, but cited him for particular acts that were allegedly contemptuous and waited until the end of the trial to impose punishment. In the recent case of *Weiss* v. *Burr, supra,* the question of an alleged contemnor's right to notice and an oportunity to be heard when the trial judge was proceeding summarily was specifically raised, and the Court held that this right was constitutionally required where, as here, the alleged contemnor was not cited and simultaneously punished for the purpose of restoring courtroom decorum or protecting the safey of court officials. It noted that this Court had discussed the precise question only in *Groppi* v. *Leslie, supra,* and in *Ex parte Terry, supra,* and concluded that the rationale of *Groppi* required recognition of the right to notice and an opportunity to be heard as a constitutional right. It left open the question of whether this right was constitutionally required where simultaneous citation and punishment were necessary to restore decorm or protect safety.

Although in the case at bar it is only necessary for this Court to hold that there is the right to notice and an opportunity to be heard when the trial judge does not simultaneously cite and punish in order to restore decorum or protect safety, the Court should make it clear that this right exists in all cases where the trial judge is proceeding summarily. Regardless of the time

at which the trial judge acts or his motivation for doing so, the fact remains that he is still finding a person guilty of a criminal offense and imposing punishment, and just as no exception to the right of trial by jury is made for contempts arising out of courtroom disruption, *Bloom* v. *Illinois*, 391 U. S. 194, 210 (1968), no exception to the right of notice and an opportunity to be heard should be made for such contempts either.

The right for which the petitioner is contending should be construed to encompass a statement of the precise charge and the facts giving rise to that charge, the opportunity to be heard in defense or mitigation, including, where necessary, the right to present extrinsic evidence, a ruling on guilt or innocence, and the imposition of punishment if the contemnor is found guilty. Assuming that the power of the trial judge to punish summarily for contempt can be exercised either at the time the allegedly contemptuous acts occurred or after the conclusion of the trial, *Sacher* v. *United States* 343 U. S. 1 (1952), the right to notice and an opportunity to be heard likewise should be given at either time. This Court should squarely hold that this right applies to all summary proceedings for criminal contempt, and that the failure to afford it is violative of due process of law.

B. The petitioner was not afforded this right with respect to any of the charges of which he was found guilty.

At no time was the petitioner properly informed of the charges against him or given any meaninfgul opportunity to respond to them. More precisely, the trial judge did not hold a *hearing* on any of the charges, in the sense of separating the contempt charge from the other matters involved in the trial, stating the precise charge and the facts giving rise to that charge, indicating that he was prepared to listen objectively to arguments in defense or mitigation, and so doing, and ruling on the petitioner's guilt or innocence. When the petitioner did have a chance to respond, as he did on counts 2 and 3, the response was essentially one for the record, and the trial judge made it clear that his mind was made up about the petitioner's guilt as soon as he cited the petitioner for contempt.[7] Due process, it is submitted, requires that there be some occasion when the trial judge *thinks* about what he is doing and *decides* whether the person he has cited was really guilty of criminal contempt.

[7]The first citation for contempt occurred during the voire dire examination by the petitioner. The trial judge informed the petitioner that he was in contempt for "asking the same question," and stated that he was going to make his decision as to punishment at the end of the trial. (App. 30). He then ordered the attorneys to file written questions for the voire dire, and the petitioner protested against his ruling at the same time as he was trying to show that he had not committed a criminal contempt. (App. 30-37). During the course of this discussion he did ask the trial judge whether the contempt citation stood (App. 36), and the trial judge subsequently rescinded the citation. (App. 37). However, he included it and imposed a 30 day sentence at the end of the trial, but subsequently realized his mistake and corrected it. (App. 26).

On count 2 the trial judge called the attorneys into chambers and stated that he was holding the petitioner in contempt for "completely ignoring the Court's ruling" with respect to evidence concerning Narvel Tinsley's escape from custody and for "the antics he's going through" (App. 42). However, when he specified the charge some three months later in his "corrected judgment," there was no reference to the supposed "antics." The petitioner was permitted to respond for the record, but the main thrust of the discussion concerned the admissibility of the evidence regarding the escape, and the petitioner continued to try to persuade the judge that the evidence was admissible. In the process both the petitioner and counsel for William M. Tinsley renewed earlier motions to sever, which were overruled (App. 43-53). At various times during the discussion, the petitioner did make reference to the contempt charge (App. 49-53), but his primary concern, necessarily, was to protect the interests of his client, and the response to the contempt charge (which was only for the record) was lost in the shuffle.

The "hearing" on count 3 consisted of the trial judge's saying: 'The court is holding Mr. Taylor in contempt for the second time during this trial for smarting off to the Court in Open Court. That's all I've got to say" (App. 56). The petitioner was given permission to respond for the record and did so (App. 56-59), and then the trial judge said that he would respond for the record. His response consisted of

criticizing the petitioner for leaving the courthouse as soon as the trial was over for the day (App. 59-60). The discussion then drifted into the matter of the petitioner's leaving the courthouse, returned to the tone of voice the petitioner had been using, and ended up with the trial judge accusing the petitioner of not following his orders (App. 60-61). The trial judge then questioned whether the petitioner was properly representing his client and accused him of not knowing how to show proper respect to the court (App. 61-62). Another discussion followed, during which the prosecutor stated that in his opinion the petitioner was trying the case in the best interest of his client, prompting the trial judge to walk out of the room and to order the reporter to record that fact (App. 63). Matters concluded with Narvel Tinsley being called in and examined with respect to his representation by the petitioner (App. 65-68).

There was no specification of the charge whatsoever with respect to count 4. The trial judge simply called the attorneys into chambers and stated, "It's the order of the Court again that Mr. Taylor is in contempt of Court" (App. 69). When he specified this charge three months later, it was that the petitioner had been "most disrespectful to the court and refused to take his seat at counsel table as ordered" (App. 25). After the judge had informed the petitioner that he was in contempt, there was a discussion about admissibility of evidence and the procedure for making objections (App. 70-79). There was no reference at all to the

contempt charge, which at this point had not been specified.

There was likewise no specification of the charge with respect to count 5, and this time when the judge summoned the attorneys into chambers, he did not say that this was because the petitioner was in contempt. He ruled that the witness whom the petitioner had been examining would not be permitted to testify further and then ordered the petitioner to submit "within five minutes" (later changed to ten and then to fifteen minutes) a list of all witnesses that he would be calling in the trial. It was only after this that he said to the petitioner, "and you are also in contempt of court for your actions in the Court just previous to that" (App. 97). He did not specify what those actions were. When the petitioner asked whether he could speak for the record, the trial judge said that he had ten minutes to submit the witness list and that, "You can speak to the record all you want to, sir" (App. 97). The petitioner then challenged the judge's order that he produce a list of witnesses within ten minutes, and when during the course of his argument he said that, "I have, I don't know, five months of my life wrapped up in this case, and maybe more than that," the trial judge interrupted him and acidly observed, "Before it's over, you might have a lot more than that" (App. 98). Various other events occurred during this time in chambers, but there was no discussion whatsoever about the alleged contempt.

There were no conferences in chambers following the citation of the other four contempts. On count 6

the trial judge simply informed the petitioner that he was in contempt, and when the petitioner asked to respond for the record, the trial judge said he could do so at the next recess (App. 107). However, this opportunity did not occur. On count 7 the trial judge permitted the petitioner to make a response for the record, but then directed the court reporter not to put the response in the record, saying: "I'm not going to even—don't even put this in the record. Mr. Taylor is not running this Court. I am" (App. 109). He specifically refused to permit the petitioner to make a response for the record on count 8 (App. 113). On count 9 he again simply informed the petitioner that he was in contempt (App. 119).

At the end of the trial, after the jury had found both defendants guilty and imposed the death penalty, but while the jury was still in the box, the trial judge summoned the petitioner before the bench, attacked his integrity and professional qualifications, told the petitioner that, "You're not responding to me on anything," threatened to gag him and impose additional contempts if he persisted in trying to speak, and reeled off sentences on nine counts of contempt,[8] ending up by directing peace officers to "take him away." Even in *Sacher* v. *United States*, 343 U. S. 1 (1952), the contemnors were given an opportunity to speak in their defense when the trial judge imposed sentence at the end of the trial, but this modicum of due process was denied to the petitioner here.

---

[8]He included the first count, forgetting that he had changed this to a warning. He corrected this error in the "corrected judgment." (App. 26).

If there is any right to notice of the charges and to be heard in defense or mitigation before a person is adjudged guilty of criminal contempt and punishment is imposed, that right was clearly denied to the petitioner. If a person charged with a minor offense were treated in the manner that the petitioner was treated here, there would be no doubt but that there had been a flagrant denial of due process of law. What happened here must truly "shock the judicial conscience," *Rochin* v. *California*, 342 U. S. 165 (1952), and demonstrates most clearly why due process requires at a minimum that an alleged contemnor be given notice of the charges and the opportunity to be heard in his defense.

C. This Court should now consider whether summary punishment for contempt itself is violative of due process of law.

If it is recognized that due process requires that an alleged contemnor be given notice of the charges and the opportunity to be heard notwithstanding that the alleged contempts were committed in the presence of the trial judge, it is but a short step to holding that there can be no justification at all for a judge proceeding summarily to convict and punish a person for criminal contempt, and this Court may now wish to consider whether summary punishment for contempt itself is violative of due process of law. This Court has long recognized that the exercise of the summary contempt power is "arbitrary in its nature and liable to abuse." *Ex parte Terry*, 128 U. S. 289, 313 (1888).

As Mr. Justice Black has stated, "The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law." *Green* v. *United States,* 356 U. S. 165, 193 (1958) (Black, J., dissenting). It is only in such a proceeding that the otherwise inconsistent functions of the judicial process are combined in a single individual who is necessarily involved in the events leading up to the charge. Again, to quote Mr. Justice Black:

> "When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. . . . To this end no man can be a judge in his case and no man is permitted to try cases where he has an interest in the outcome. . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Green* v. *United States, supra* at p. 199.

If due process requires that the officer presiding over a proceeding which may result in loss of liberty must be "neutral and detached," *Ward* v. *Village of Monroeville,* 409 U. S. 57, 62 (1972), not only is summary

punishment for contempt an anomaly, but it is contrary to the fundamental premises upon which the concept of due process of law is based. It is most clearly a situation "in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Tumey* v. *Ohio,* 273 U. S. 510, 534 (1927).

In *Bloom* v. *Illinois,* 391 U. S. 194, 201 (1968), this Court recognized that criminal contempt "is a crime in the ordinary sense," and again noted that it had "long recognized the potential for abuse in exercising the summary power to imprison for contempt.". It is precisely because the summary contempt power is subject to such potential abuse that its exercise has been strictly limited to matters occurring within the presence of the judge. See *e.g., Johnson* v. *Mississippi,* 403 U. S. 212 (1971). It may also not be exercised when there is the danger that the judge's objectivity can be called into question. See *e.g., Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971). Appellate review of the trial judge's findings is considered extremely important, as illustrated by strictness of the certification requirements of Federal Rule of Criminal Procedure 42(a). See *e.g., Tauber* v. *Gordon,* 350 F. 2d 943 (3rd Cir., 1965); *United States* v. *Marshall,* 451 F. 2d 372 (9th Cir., 1971).[9] The potential for abuse and the con-

[9]The fact that appellate review of contempt convictions is available does not vitiate the due process violation inherent in the exercise of the summary contempt power, since there is a right to due process "in the first instance." *Ward* v. *Village of Monroeville, supra* at p. 62.

stant necessity for imposing safeguards against such abuse raise serious questions as to the utility of retaining the summary contempt power.

That the potential for abuse has become a reality is demonstrated empirically by the numerous reversals of summary contempt convictions by appellate courts. In a study conducted by the Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, all published cases of summary contempt from 1960 to 1972 were analyzed. This analysis showed that of the seventy-two cases where the trial judge imposed summary punishment, forty (more than 60%) were later reversed by an appellate court. Twenty-three of the reversals were on the merits. Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, *Disorder in the Court,* 233-234 (1973) [hereinafter cited as *Disorder in the Court*]. If this Court holds, as it should, that the due process requirements of notice and an opportunity to be heard apply to summary contempt proceedings, it should consider further whether due process also requires that the summary contempt power itself be given a well-deserved burial.

Two justifications have been traditionally set forth for upholding the exercise of the summary contempt power. The first was that of "preserving order"—the exercise of the power was necessary to preserve order in the courtroom—and the second was that of "judicial economy"—since the trial judge witnessed the contumacious conduct, there was no utility in having a

hearing before another judge. See the discussion in *Cooke* v. *United States,* 267 U. S. 517, 534-539 (1924). The first justification was severely undercut by this Court's decision in *Sacher* v. *United States,* 343 U. S. 1 (1952), where it was held that the trial judge could proceed summarily even though he waited until the trial was at an end to cite and punish for contempt. The "judicial economy" justification is likewise very questionable, since, as pointed out previously, the judge before whom the alleged contempt was committed, even if not disqualified by lack of impartiality, may still be mistaken as to the actual facts and as to whether the conduct of the alleged contemnor amounted to criminal contempt. The fallacy of the "judicial economy" justification is illustrated by the reversal pattern referred to above, and by cases in which on remand there was trial before another judge, and conduct found contemptuous by the judge in whose presence it was committed was found by the other judge not to be contemptuous at all. See *e.g., United States* v. *Meyer,* 346 F. Supp. 973 (D.D.C. 1972). Moreover, again to quote from Mr. Justice Black's dissent in *Green* v. *United States, supra* at p. 216:

> "It is undoubtedly true that a judge can dispose of charges of criminal contempt faster and cheaper than a jury [or in a trial before another judge]. But such trifling economies as may result have not generally been thought sufficient for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions

> were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy."

Considerations of "judicial economy" do not justify a departure from those fundamental principles of procedural fairness that are reflected in the concept of due process of law.

If the "judicial economy" justification is found wanting, it is necessary to fall back on the "preserving order" justification. This justification is necessarily inapplicable where, as here, the trial judge waits until after the trial to impose punishment. At a minimum this Court should hold that due process prohibits the exercise of the summary contempt power after the trial has terminated and in any case where such exercise is not shown to have been necessary for the purpose of preserving order in the courtroom. The principle that the summary contempt power may constitutionally only be exercised where necessary to preserve order and prevent disruption was recognized in *In re Oliver,* 333 U. S. 257 (1948), where this Court held violative of due process the summary contempt conviction of a witness for allegedly testifying falsely and evasively before a circuit judge who was conducting a "one-man grand jury" investigation. In response to the argument that summary punishment was proper because the contempt

was committed in the presence of the judge, this Court stated:

> "It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. *Ex parte Terry,* 128 U. S. 289, was such a case. . . . This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances in the courtroom by immediate punishment. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise." 333 U. S. at 274.

The Court also referred to the principle that the authority to punish for contempt was limited to "the least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 19 U. S. (6 Wheat.) 204 (1821). As one commentator has noted of the decision: "The Court recognized that this contempt was in a sense 'direct' because committed in the presence of the judge. It pointed out, however, that the *need* for summary punishment was not present here as it would be in the case of a heckler in court. In this situation, where the need for immediate punishment was absent, the Court thought that a full adversary hearing was a requirement of due process." Dobbs, Contempt of Court: A Survey, 56 *Corn. L. Rev.* 183, 230 (1971).

It is true that in *Sacher* v. *United States,* 343 U. S. 1 (1952), this Court upheld the propriety of the trial judge's waiting until the end of the trial to punish for contempt, but in *Sacher* the constitutional issue was not presented, since the grant of certiorari was limited solely to the question of whether the trial judge could proceed in this manner under Federal Rule of Criminal Procedure 42(a), *supra* at p. 5, and there was no discussion of the constitutional issue in the opinion. Under the principles recognized in *Oliver,* the exercise of the summary contempt power after the trial or where otherwise not necessary to prevent immediate courtroom disruption is violative of due process of law, and insofar as Rule 42(a) may be construed as permitting such exercise, it should be declared unconstitutional.

The petitioner would go further, however, and contend that the exercise of summary contempt power cannot be justified even where the alleged contemnor is cited and punished immediately in order to prevent alleged courtroom disruption. The denial of due process inherent in the combination of inconsistent functions in the trial judge is the same irrespective of the justification that is advanced for it or the time at which it occurs. *More significantly, the summary contempt power simply is not necessary to prevent courtroom disruption.* The judge can preserve order by means other than the use of the summary contempt power, and there is no reason to believe that removal of this power will have any effect whatsoever on the "orderly processes of justice."

In the first place it is now quite clear that there is no serious quantitative problem of disruption in American courts. See *Disorder in the Court,* pp. 6-9. What little disruption has occurred has been given extensive publicity far out of proportion to its incidence. Disruption by lawyers has been shown to be even more miniscule. *Disorder in the Court,* pp. 131-132. It may also be noted that the focal point of the concern over courtroom disruption, the widely-publicized "Chicago 7" trial, now can be viewed in retrospect as a true aberration, and that the disruption that occurred there was due in no small part to the fact that the trial was presided over by a judge whose "deprecatory and antagonistic attitude toward the defense" was so extreme as to require a reversal of the convictions apart from the numerous other trial errors that he committed. *United States* v. *Dellinger,* 472 F. 2d 340 (7th Cir., 1972).[10] Indeed, there is substantial evidence to the effect that the prime determinant of courtroom disruption will be the actions, positive and negative, of the

[10] When the contempt charges arising out of that case were tried before another judge, Hon. Edward T. Gignoux, sitting by designation, he found the defendants not guilty of all but 13 of the 52 remanded charges. As to those charges, he found that all but two were in response to "peremptory action of the judge" and concluded that the mitigating circumstances present in that case were such that "no warrant exists for the imposition of jail sentences additional to the periods of imprisonment which have already been served by the non-lawyer defendants." Judge Gignoux also observed that: "It is apparent that the contumacious conduct of the defendants and their lawyers cannot be considered apart from the conduct of the trial judge and prosecutors. Each reacted to provocation by the other, and the tensions generated during four and a half months of so acrimonious a trial cannot be ignored." *In the Matter of Dellinger,* 72 Cr. 925, U. S. Dist. Ct., N. D. Ill., Dec. 6, 1973 (slip opinion, pp. 49-50).

trial judge himself. See the discussion in *Disorder in Court*, pp. 192-205.

But assuming that disruption can and does occur, and that the trial judge must be equipped to deal with it, there are numerous other methods he can employ that fall short of imposing summary punishment for criminal contempt and that are not subject to the abuses of the exercise of the summary contempt power which this Court has long recognized, and which are clearly demonstrated in the case at bar. He can deal with the disruptive defendant by using any of the weapons in the "arsenal of authority" set forth by this Court in *Allen* v. *Illinois*, 397 U. S. 337 (1970), including directing the removal of the defendant from the courtroom. With respect to possibly disruptive lawyers, a citation for contempt, which the assurance of subsequent trial and possible conviction and the likelihood of resultant bar disciplinary proceedings, should be a deterrent for all but the most persistently obstructive. In the exceedingly rare case where a lawyer will have embarked on a course of persistent obstruction, it is doubtful if punishment for contempt will make any difference. As stated by the Louisville Bar Association in its *amicus curiae* brief:

> "In the case of an attorney, if the threat of subsequent criminal action and professional discipline are not enough to restrain him, in those instances where the disruption is so great that it threatens the validity of the trial, it would be better to declare a mistrial and cite the attorney for Contempt. This would protect the defendant and prevent a complete retrial of a long case after a

> reversal by an Appellate Court. Otherwise, the court must bear the burden of a continuous contest between the attorney and the authority of the court resulting in a detriment to all parties involved and the possibility of prejudicing the jury." Brief of the Louisville Bar Association as Amicus Curiae in Support of Petition for Certiorari, pp. 15-16.

The integrity of judicial proceedings can be fully protected without resort to summary punishment for criminal contempt.[11]

It is a long established principle that a court must exercise "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 19 U. S. (6 Wheat.) 204, 231 (1821); *In re Michael*, 326 U. S. 224, 227 (1945); *Shillitani* v. *United States*, 384 U. S. 364, 371 (1966). Any need to prevent courtroom disruption can be met by means other than the exercise of the summary contempt power. Even if this were not so, the necessity for the exercise of that power would have to be balanced against the departure from the basic standards of fair play and due process that such exercise necessarily entails. In *Bloom* v. *Illinois*, *supra* at p. 208, this Court stated:

> "We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without

[11] It is worthy to note that administrative agencies have long been denied the contempt power, *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894), and this does not appear to have had any appreciable effect on the conduct of administrative proceedings.

> the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries."

Summary punishment for contempt is totally repugnant to "those institutionalized procedures which have been worked out over the centuries" and is contrary to the fundamental premises on which the concept of due process of law is based. This Court should now so declare.

III.

In the Circumstances of This Case the Trial Judge Could Not Impartially Sit in Judgment on Multiple Contempt Charges Against the Petitioner.

Although the trial judge cited the petitioner for contempt at various times during the trial, he did not act to impose punishment until after the trial had been completed. Since the trial judge waited until the end of the trial to impose punishment, as the Kentucky Court of Appeals recognized, if he could not impartially sit in judgment on the contempt charges, the petitioner's conviction would have had to have been reversed. *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971). The Court of Appeals held, however, that the trial judge was not disqualified from sitting in judg-

ment on the multiple contempt charges he leveled against the petitioner.

It is well-settled that the trial judge is disqualified to sit in judgment on contempt charges where he has become *personally embroiled in controversy* with the alleged contemnor, such as where he is an "activist seeking combat," *Offutt* v. *United States*, 348 U. S. 11 (1954), or where he has been the victim or a "personal attack," *Mayberry* v. *Pennsylvania, supra,* or where for any reason he may be biased against the alleged contemnor, *Johnson* v. *Mississippi*, 403 U. S. 212 (1971), or where he has an adopted an adversary posture with respect to the alleged contemnor. *United States* v. *Meyer*, 462 F. 2d 827 (D.C. Cir., 1972). In the case at bar all four elements of embroilment were clearly present, and the holding of the Kentucky Court of Appeals to the effect that in the circumstances of this case the trial judge could impartially sit in judgment on the contempt charges is truly astonishing.

The animus and hostility of the trial judge toward the petitioner is amply demonstrated by his conduct and statements throughout the trial and thereafter. To say the least, the interchanges between the trial judge and the petitioner during the trial "were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor." *Offutt* v. *United States, supra* at p. 12. From the beginning, the trial judge cast aspersions on the petitioner's character and ability and accused him of improper motives. During the voir dire, the trial judge interrupted the petitioner's examination of a prospec-

tive juror and stated that he was going to take it over, saying to the petitioner: "I think you're putting on a show. That's my opinion" (App. 31). During a discussion in chambers about wrangling between attorneys, he stated in reference to the petitioner: ". . . you all were talking and I can't blame the guy too much for that, but on the other hand, he is getting away from the questions and knowing him, if you give him an inch, he'll take a mile. I might as well sit on him right now" (App. 40). In other interchange the trial judge again insisted on indulging in personalities and baiting the petitioner:

> "Mr. Taylor: Does Your Honor understand that my purpose is to defend my case?
>
> The Court: I think that's probably what you're here for, I'm not sure" (App. 61).

And in still another interchange when the petitioner attempted to explain his basis for making an objection:

> "Mr. Taylor: The objection is that he uses the word 'also' as inferring that he's got these great confessions.
>
> The Court: Don't go through all those configurations and put on an act." (Tr. 1860)

The trial judge also accused the petitioner of "trying to make every case a political trial," and in a totally unprecedented move, directed that the petitioner prepare a list of every witness he planned to call within fifteen minutes and summarily ruled on whether those witnesses would be permitted to testify. (App. 82-83)

The effect of the trial judge's hostility toward the petitioner on his imposition of the sentences for contempt is graphically illustrated by the following interchange:

> "Mr. Taylor: Thank you. Now, may I say, additionally, I have serious doubts as to the legal correctness of the order and since we have, I have, I don't know, five months of my life wrapped up in this case, and maybe more than that—
>
> The Court: (interrupting) Before it's over, you might have a lot more than that.
>
> Mr. Taylor: Would the Court care to amplify on the meaning of that?
>
> The Court: The Court just made a statement.
>
> Mr. Taylor: Sir, I didn't—
>
> The Court: (interrupting) The Court just made a statement.
>
> Mr. Taylor: Yes, sir, and I asked if the Court would care to expand on the meaning of—
>
> * * * * * * *
>
> The Court: (interrupting) I don't have to explain my comments.
>
> Mr. Taylor: I see. I'm requesting that you reconsider and that you adjourn until tomorrow and give me an opportunity to get before our reviewing Court for a Writ of Mandamus—
>
> The Court: (interrupting) Overruled.
>
> Mr. Taylor: I wonder if I might finish my sentence before you overrule—
>
> The Court: (interrupting) It's overruled" (App. 98-99).

It cannot be doubted that in the case at bar the contempts charged were "entangled with the judge's

personal feeling against the lawyer." *Offutt* v. *United States, supra* at p. 14. Marked personal feelings were present, at least on the part of the trial judge, and as the above examples indicate, he clearly was an "activist seeking combat."

Moreover, while it is indeed true, as the Kentucky Court of Appeals found, that the petitioner did not launch a personal attack against the trial judge (App. 16), the fact remains that the trial judge perceived himself as the victim of such an attack. This appears most clearly in the contempt citations themselves and in his "introductory remarks" thereto, as well as in his language at the time of imposing sentence.

Thirdly, the Court of Appeals was completely incorrect in saying that the petitioner did not attack the trial judge's "integrity or ability" (App. 10). Quite to the contrary, in attempting to defend his client to the best of his ability, it was painfully necessary for the petititoner to accuse the trial judge of denying his client's right to a public trial (App. 79) and of acting on the basis of rancor in ruling that race was not an issue in the case (App. 82). It was also necessary for the petitioner to seek a delay in the case so that he could attempt to obtain a writ of mandamus from the Court of Appeals to prevent the trial judge from proceeding further in the case (App. 98-99). And when the petitioner made some reference to the jury in arguing an evidentiary point, the trial judge accused him of inferring that he, the trial judge, had "rigged the jury." When the petitioner stated that he had filed a motion challenging the jury composition, the trial

judge replied: "I impaneled this jury. If it's rigged, I did it" (App. 86). The petitioner was clearly charging the trial judge with bias and unfairness, and the trial judge was fully sensitive to this charge, as cogently evidenced by his statements in regard to his "rigging the jury." A trial judge is disqualified from proceeding against an alleged contemnor when that person has charged him with bias or unfairness. *Holt* v. *Virginia,* 381 U. S. 131 (1965); *United States* v. *Meyer, supra; In re Dellinger,* 461 F. 2d 389 (7th Cir., 1972). In such circumstances, *Ungar* v. *Sarafite,* 376 U. S. 575 (1964), which was relied on by the Court of Appeals to hold that the trial judge was not disqualified from sitting in judgment against the petitioner, is clearly inapposite. See the discussion in *United States* v. *Meyer, supra,* at p. 845.

Finally, the trial judge is disqualified from sitting in judgment on contempt charges where he has "adopted an adversary posture with respect to the alleged contemnor." *United States* v. *Meyer, supra,* at p. 862. Whatever else may be said about this case, it cannot be denied that the trial judge adopted an adversary posture with respect to the petitioner. In the view of the Kentucky Court of Appeals, the trial judge "appeared to be continuously on the defensive in his effort to contain Taylor to the point where the defendant would be assured of a fair trial" (App. 11). While the petitioner would vigorously dispute this characterization of who was put on the defensive by whom, it is utterly incongruous for the Court of Appeals to recognize the adversary posture between the

trial judge and the petitioner and at the same time to hold that the trial judge was not disqualified from sitting in judgment on the multiple contempt charges he levelled against the petitioner.

In the case at bar all four elements of embroilment were clearly present, but even more significantly, the animus and hostility of the trial judge toward the petitioner and his obvious lack of impartiality fairly "scream out" from the record. If "actions speak louder than words," this is manifestly demonstrated by his unprecedented order that the petitioner produce a list of all defense witnesses within fifteen minutes, and his summarily deciding in advance that many of them would not be permitted to testify,[12] by his invalid order prohibiting the petitioner from the further practice of law in "his court," and by his refusal to admit the petitioner to bail or to even hold a bail hearing (at which the petitioner was not permitted to be present) until ordered to do so by the Court of Appeals.

But above all else there is the behavior of the trial judge at the conclusion of the trial when he finally adjudged the petitioner guilty of the contempts charged and imposed consecutive sentences aggregating 54 months' imprisonment. The trial judge not only ac-

---

[12]For example:

"The Court: What's Hyde got to do with this?
Mr. Taylor: Quite a bit.
The Court: He just was at that time Chief of Police?
Mr. Taylor: He was in charge of the whole thing.
The Court: Strike him." (Tr. 1989).

And further:

"The Court: I am not going to hold up these proceedings waiting for a witness. If he's here, he can testify, if he isn't, *we'll skip over him.*" (App. 111). (Emphasis added.)

cused the petitioner of improper motives, not only criticized the bar association for not having disciplined the petitioner "years ago," not only said that he wanted the members of the jury and the law students "of the community" to hear his remarks, but refused to allow the petitioner to speak a word in his defense, threatened to gag him and impose more contempts if he persisted in trying to do so, and directed the bailiff to "take him away" (App. 28-29). The utter absence of any semblance of impartiality is reflected in the statement he made when he began to impose sentence, "I *have* you on nine counts" (App. 29). (Emphasis added.) The Court of Appeals referred to the trial judge's remarks as "inappropriate," and conceded that they were "somewhat similar to the statements made in *Offutt*" (App. 15-17). But it then went on to say that they did not clearly demonstrate bias. If those remarks and the judge's behavior at the time he was sentencing the petitioner of 54 months' imprisonment do not demonstrate bias, it may seriously be asked what does.

The Court of Appeals then took the rather startling position that "in light of the obvious guilt of Taylor those remarks were not such a showing of bias as to require the disqualification of the judge" (App. 17). It is utterly impossible to see what the supposed "obvious guilt" of the alleged contemnor has to do with the bias of the judge. If the judge has demonstrated by his words and behavior an unmistakable bias against the alleged contemnor, as he did here, he is not capable of maintaining "that calm detachment neces-

sary for fair adjudication," *Mayberry* v. *Pennsylvania, supra,* at p. 465, and cannot impartially sit in judgment on the contempt charges. A clearer case of guilt than was present in *Mayberry* cannot be imagined, *supra,* at pp. 462-463, but the guilt of the contemnor had nothing to do with the ability of the judge to impartially sit in judgment against him.

If trial before an unbiased judge is essential to due process of law, *Bloom* v. *Illinois,* 391 U. S. 194, 205 (1968), there was a flagrant denial of due process here when the trial judge sat in judgment on the contempt charges that he leveled against the petitioner.

Although not absolutely necessary to the decision of this case, since the trial judge did not simultaneously cite and punish the petitioner for contempt in order to quell courtroom disruption, this Court should make it clear that where a trial judge is otherwise disqualified to sit in judgment on contempt charges, he may not summarily cite and punish for contempt even if this is purportedly necessary to "preserve order." As pointed out in the previous section of the brief, there are other means by which a judge can maintain order in the courtroom short of the use of the contempt power, and where he cannot impartially sit in judgment, the denial of due process is no less because committed in the name of "preserving order."

The conviction of the petitioner must be reversed, if for no other reason, than that he was denied the right to trial before an unbiased judge.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals of Kentucky should be reversed and the conviction of the petitioner for criminal contempt should be set aside.

Respectfully submitted,

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kestucky 40506

DORIS PETERSON
MORTON STAVIS
Center for Constitutional Rights
853 Broadway
New York, New York 10003

Attorneys for Petitioner

Supreme Court Of The United States

No. 75-459

DANIEL T. TAYLOR, III

Petitioner

vs.

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION

Respondent

Supreme Court, U. S.
FILED
JAN 27 1976
MICHAEL RODAK, JR., CLERK

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF OF THE LOUISVILLE BAR ASSOCIATION AS AMICUS CURIAE

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202

JOE G. LEIBSON
Marion E. Taylor Building
Louisville, Kentucky 40202

Counsel for Amicus, Louisville Bar Association

Of Counsel:
ED P. JACKSON
320 West Liberty Street
Louisville, Kentucky 40202

JOHNSON PRINTING CO., P. & BAY PUB., CINCINNATI, O. 45202

TABLE OF CONTENTS

	PAGES
INTEREST OF THE AMICUS CURIAE	1- 3
SUMMARY OF ARGUMENT	3- 6
ARGUMENT	6-34
INTRODUCTION:	
The Summary Nature of the Contempt Power Should be Foreclosed Because it is Far in Excess of the Power Necessary to Serve the Ends for Which it Exists.	6-12
I. When an Alleged Contemnor is Sentenced to Punishment in Excess of the Requisite Amount to Establish the Contempt as a Serious Crime, Thereby Guaranteeing the Defendant the Right to a Trial by Jury on the Charges, the Trial Judge and the Appellate Court Should Not Be Permitted to Alter the Sentence at a Later Time to Foreclose the Defendant's Right to a Trial By Jury.	12-19
II. The Constitutional Guarantee of Due Process of Law Requires That in All Contempt Situations an Alleged Contemnor Must be Permitted to Speak in Defense or Mitigation of the Charges Against Him, Including Those Contempts Committed by an Attorney in the Presence of the Trial Judge, Before He is Adjudged Guilty and Sentence is Imposed.	19-25
III. In the Circumstances of This Case the Trial Judge Could Not Impartially Sit in Judgment on Multiple Contempt Charges Against the Petitioner.	25-34
CONCLUSION	34

TABLE OF AUTHORITIES

Cases: PAGES

Anderson v. *Dunn*, 6 Wheat 204 (1821) 11
Arnett v. *Meade*, Ky., 462 S.W.2d 940 (1971) .. 9
Baldwin v. *New York*, 399 U.S. 66 (1970) 15
Beasley v. *Wingo*, Ky., 432 S.W.2d 413 (1968) . . 14
Bloom v. *Illinois*, 391 U.S. 194 (1968) 13, 15, 17
Cheff v. *Schnackenberg*, 384 U.S. 373 (1966) .. 15
Cooke v. *United States*, 267 U.S. 517 (1925) ... 11
In re Dellinger, 461 F.2d 389 (CA 7 1972) 14, 16
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 13
Escobedo v. *Illinois*, 378 U.S. 478 (1964) 32
Frank v. *United States*, 395 U.S. 147 (1969) ... 18
Fuentes v. *Shevin*, 407 U.S. 65 (1972) 25
Gideon v. *Wainwright*, 372 U.S. 335 (1963) ... 32
Goldberg v. *Kelly*, 397 U.S. 254 (1970) 25
Grannis v. *Ordean*, 324 U.S. 385 (1914) 20
Green v. *United States*, 356 U.S. 165 (1958) . 10, 12, 29
Groppi v. *Leslie*, 404 U.S. 496 (1972) 20, 21, 22
In re Hammersmith, 4 EX. 87, 154 Eng. Rep. 1136 (1849) 20
Hill v. *United States ex rel Weiner*, 300 U.S. 105 (1936) 8
Illinois v. *Allen*, 397 U.S. 337 (1970) 32
The King v. *The Chancellor, Masters and Scholars of the University of Cambridge*, 1 STR. 557, 93 Eng. Rep. 698 (1723) 20
McBride v. *Commonwealth*, Ky., 432 S.W.2d 410 (1968) 14
Mayberry v. *Pennsylvania*, 400 U.S. 455 (1971) 8, 27, 30
In re Michael, 326 U.S. 224 (1945) 11
In re Murchison, 349 U.S. 133 (1955) 27, 30, 33
Offutt v. *United States*, 348 U.S. 11 (1954) 27
In re Oliver, 333 U.S. 257 (1948) 20

In re Pollard, 5 Moore P.C. (N.S.) 111, 16 Eng. Rep. 457 (1868) 20
Sacher v. *United States*, 343 U.S. 1 (1952) 28, 29
Samaratunga v. *The Queen*, (1958) A.C. 424 21
In re Savin, 131 U.S. 267 (1888) 8
Shillitani v. *United States*, 384 U.S. 364 (1966) 11
Taylor v. *Hayes*, Ky., 494 S.W.2d 737 (1973) 8, 16, 26
Ex Parte Terry, 128 U.S. 289 (1888) 21
Ungar v. *Sarafite*, 376 U.S. 575 (1964) 27
United States v. *Barnett*, 376 U.S. 681 (1964) 7
United States v. *Galante*, 289 F.2d 72 (CA 2 1962) 21
United States v. *Green*, 241 F.2d 631 (CA 2 1957) 7
United States v. *Meyer*, 462 F.2d 827 (CA DC 1972) 22, 27, 28, 30
United States v. *Seale*, 461 F.2d 345 (CA 7 1972) 8, 14, 15
Weiss v. *Burr*, 484 F.2d 973 (CA 9 1973) 22, 23
Wheeler v. *Montgomery*, 397 U.S. 280 (1970) 25

Miscellaneous Authorities

Black's Law Dictionary, 4th Edition, Revised (1968) 20
Disorder in the Court, the Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct (1973) 9, 10
Edward Livingston Works, Vol. I (1873) 7
The Federal Prison System - 1964, Hearing before the Subcommittee on National Penitentiaries of the Senate Committee on the Judiciary, 88th Cong. 2d Sess. (Jan. 22, 1964), p. 10. 8
Pekelis, *Legal Techniques and Political Ideologies*, 41 Mich. L. Rev. 665 (1943) 1

SUPREME COURT OF THE UNITED STATES

No. 73-473

DANIEL T. TAYLOR, III — *Petitioner*

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION — *Respondent*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF OF THE LOUISVILLE BAR ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Louisville Bar Association was established in 1900, originally comprising a small group of attorneys in the local community. Over the years, the Association has gradually grown to a membership numbering over 1,000 attorneys and judges from the entire metropolitan area. The purposes of the Association, as enumerated in its constitution, are to promote and maintain high standards for the legal profession; to promote legal educa-

tion; to cultivate association and acquaintance among the members of the Bar; to increase their usefulness in the administration of justice; and to promote legal and judicial reforms.

In furtherance of these goals and in the interest of its membership, the Association submits this brief. This case is one that arises out of the use by the trial judge of the Summary Contempt Power, a power which stands as an anomaly in our law, wherein the accused is often denied normal Constitutional rights that are guaranteed to criminal defendants in virtually all other types of crimes. This summary power was used against the Petitioner to obtain his conviction. However, the questions raised in this Appeal do not concern Daniel Taylor alone. Since all persons and particularly attorneys, who are ethically bound to provide effective counsel for their clients, are subject to this nearly despotic power, this case involves questions of Constitutional law which far transcend the particular facts. It is not our intention to become an advocate for the Petitioner and we adopt his position only insofar as the issues herein apply to all attorneys in that they might suffer conviction under the same procedures used against the Petitioner.

The Louisville Bar Association raises the question of whether the judiciary shall continue to possess this summary power which is exercisable in violation of the Constitutional rights of all those who appear in the courtroom. This question is of a vital concern to all practicing attorneys, not only in Louisville, but in every courtroom across the country. It should be pointed out that this Appeal, even from the Petitioner's standpoint,

does not reach the question of guilt or innocence. The appeal challenges the procedures by which the conviction was obtained.

Thus, the membership of the Louisville Bar Association has a vested interest in the outcome of this case as it relates to the balance between the summary contempt power of a judge and the Constitutional rights of an attorney zealously representing his client.

SUMMARY OF ARGUMENT

I. At the conclusion of the summary contempt proceeding conducted by the trial judge, the Petitioner stood accused, convicted, and sentenced of a serious crime. His sentence was far in excess of the penalty which would entitle him to a jury trial on the charges. He was denied a jury trial because the Trial Court and the Court of Appeals of Kentucky reduced his sentence. The Amicus maintains that the original sentence should determine the right to a trial by jury. Later reductions in the sentence do not affect the seriousness of the crime. Therefore the Petitioner was unconstitutionally denied his right to a jury trial.

Various loopholes now exist through which an alleged contemnor can be denied a jury trial when charged with a serious crime of contempt. The Amicus respectfully urges the Court to tighten the Constitutional standards that control contempt by adopting the following rules: 1) The sentence originally imposed by the trial judge determines the seriousness of the crime. Later reductions of the sentence do not affect that determination; and 2) In the case of multi-

ple petty contempts, the sentences must be aggregated to determine the seriousness of the crime for jury trial purposes.

Alternatively, the Amicus respectfully contends that contempt should be treated like any other crime for jury trial purposes. Since the possible penalty for contempt is unlimited, an alleged contemnor should be given a jury trial in all cases where imprisonment is contemplated.

II. When the Petitioner was sentenced at the conclusion of trial he attempted to speak in his defense. The trial judge responded by cutting off his attempt and threatening to forcibly silence him. The trial judge waited until the end of trial to pass sentence and the Petitioner was denied his Constitutional right to Due Process of Law, when he was prevented from speaking in defense or mitigation of his crime. This right, the right of allocution, is one of the oldest principles of Common Law. All alleged contemnors should be given the right to speak before imposition of sentence, even in the cases where contempt occurs before the judge in open trial.

The Amicus respectfully urges the Court to guarantee to all alleged contemnors a full Due Process hearing before conviction and the imposition of sentence. Justice and fairness would best be served if this were the case. The contempt power would be just as effective. Since this Court has extended Due Process guarantees even to the deprivation of private property in a civil action, the time is long overdue that Procedural Due Process be guaranteed to alleged contemnors before conviction and before criminal penalties can be imposed.

III. The Petitioner was denied his Constitutional right to a fair trial before an impartial magistrate because the trial judge had adopted an adversary posture towards him. This adversary posture was evidenced by certain remarks made about the Petitioner by the trial judge, and by the unusual manner in which he passed sentence. The Court of Appeals of Kentucky held that the judge was not disqualified from passing judgment upon the Petitioner because of bias. However, the Court of Appeals did not consider the adversary posture test.

In the contempt situation the judge is called upon to play the roles of complainant, judge, jury and disciplinarian. Because of human frailty and the fact that judges often view attacks upon the court as personal attacks, the chances against a judge remaining fair and impartial are very great. It would be more realistic to assume that no judge before whom allegedly contemptuous acts are committed can properly and fairly conduct a summary contempt proceeding in a manner that would conform to the fair trial before an impartial magistrate test of Due Process.

Therefore, the Amicus respectfully submits that if the right to a fair trial before an impartial judge is to be guaranteed, then a judge other than the one who witnessed the alleged contempt should conduct a hearing on the charges. The role of the trial judge should be limited to a citation for contempt that would be equivalent to an indictment. The contemnor would have to answer the charges before another judge in a hearing after the conclusion of trial. The Amicus is convinced that the power to cite for contempt, combined with the physical restraints that were approved in *Illinois* v.

Allen, 397 U.S. 337, 344 (1970), is adequate for the judge to maintain control of the courtroom.

ARGUMENT

INTRODUCTION

THE SUMMARY NATURE OF THE CONTEMPT POWER SHOULD BE FORECLOSED BECAUSE IT IS FAR IN EXCESS OF THE POWER NECESSARY TO SERVE THE ENDS FOR WHICH IT EXISTS.

As previously stated, this case involves questions of Constitutional law which far transcend the particular facts and the interest of the Petitioner. In keeping with our role as spokesman for our membership and in the interest of all practicing attorneys, the Amicus presents this introductory discussion of the contempt power. The recommendations of the Amicus which follow would virtually foreclose the summary nature of the contempt power if they are adopted by the Court. If the Court is to act upon the general nature of contempt power, then a discussion of the power as it has evolved and exists at present is appropriate. Therefore, the Amicus presents this introduction to give perspective and support to the argument that follows.

The Summary Contempt Power stands as an anomaly in the law, which is contrary to the spirit and purpose of the Constitution and Bill of Rights. Since this power is far in excess of the power needed by the judiciary to adequately serve the ends for which it exists, it should be severely restricted. This Court should no longer countenance the summary disposition of contempt charges without all the normal Due Process guarantees

enjoyed by virtually all other criminal defendants.

The arbitrary nature of the contempt power and the dangers of its abuse have long been recognized. As Edward Livingston said in 1873; 1 *Edward Livingston Works*, 260 (1873):

> "An offense so ill defined, so liable to be imputed, embracing such a variety of dissimilar acts, would be dangerous and oppressive in the extreme, were it to be prosecuted according to the ordinary forms of law; but all these are disregarded."

The Amicus believes that the abuse so long feared is now upon us. At the time of the adoption of our Constitution the penalties for contempt were trivial. In *United States* v. *Barnett*, 376 U.S. 681, 748 (1964), Justice Black in a study of the evolution of the contempt power said:

> "The available evidence of the practice in criminal contempt cases also suggests that punishments were trivial. This practice was described by Chief Justice Kent in 1809 as follows: 'There is no such thing as an abuse of this power in modern times. The case probably is not to be found. An alarm cannot be excited at its existence, in the extent now laid down . . . . The tendency of the times, is rather to induce the courts to relax, than increase in the severity of their ancient discipline, to exercise their power over contempts with extreme moderation.' "

It has been noted that there seems to be no reported case prior to 1914 which imposed a sentence of more than one year for contempt. *United States* v. *Green*, 241 F.2d 631, 634 (CA 2 1957). Also in *Barnett*, supra, p. 753, Justice Black found that severe penalties for contempt were of recent origin:

> "The imposition of serious penalties for criminal contempts is a relatively recent phenomenon. From the foundation of the Republic until 1957 I am aware of only two isolated instances of imprisonment for longer than six months for criminal contempt brought to the attention of this Court. *In re Savin*, 131 US 267, 33 L ed 150, 9 S Ct 699 (one year); *Hill* v. *United States ex rel. Weiner*, 300 US 105, 81 L ed 537, 57 S Ct 347 (two years). Since 1957, however, our attention has been called to at least six instances where imprisonment of a year or more was imposed."

The courts no longer exercise their power of contempt with extreme moderation. Recent cases have imposed excessive sentences for contempt. *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971) 11-22 years; *Taylor* v. *Hayes*, Ky., 494 S.W.2d 737 (1973) original sentence, 54 months; *United States* v. *Seale*, 461 F.2d 345 (CA 7 1972) 4 years. In 1962, the average sentence for convicted contemnors received in federal prisons was 6.4 months, thus making the average contempt a serious crime. *The Federal Prison System - 1964*, hearing before the Sub-Committee on National Penitentiaries of the Senate Committee on the Judiciary, 88th Congress, 2d Sess. (Jan. 22, 1964), p. 10. The crime of contempt has changed in the years since the nation was founded, from a petty or trivial offense to a most serious and infamous crime.

The crime of contempt has met with increasingly severe penalties for two reasons. First, because of its arbitrary nature, this nearly despotic power has grown in and of itself. Second, because the courts view themselves as under seige in an age of political unrest

that challenges our most sacred institutions.

A recent statement of the Court of Appeals of Kentucky in the case of *Arnett* v. *Meade*, Ky., 462 S.W.2d 940, 948 (1971), evidences this attitude:

> "But times have changed. Some elements of our society are fomenting disrespect for the courts and encouraging contemptuous conduct. The courts are confronted with a serious threat to the structure of our system of justice. Dollar and time limits suitable for conditions of the previous century are not adequate for the conditions of today."

However, it appears that the courts of this country are laboring under a misconception. Cases such as the Chicago Seven Conspiracy Trial and the New York Black Panther Trial have received an inordinate amount of media coverage. The coverage of such trials has fostered an opinion among the public and the bar, that the courts are under a concentrated attack. The judiciary, the organized bar, and state legislatures have reacted very strongly to this supposed threat.

In order that a scientific study of this problem might be undertaken, the Bar of New York City impaneled a special committee. The committee surveyed one-third of the federal trial judges on the problem of disorder in the courts. Their findings were most revealing; *Disorder in the Court,* Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct, p. 6 (1973):

> "Based on these figures the total incidence of courtroom disorder leading to a contempt conviction in the federal system is less than one-fifth of 1 percent of the criminal trials, and an even lower percentage of the total trials."

It is evident from the study that the majority of contemnors are not radicals bent on tearing down the courts but rather ordinary felons, undoubtedly bewildered and frustrated by the situation they find themselves in.

Contempt does not present a political problem nor does it present a problem which could be considered statistically important. The total incidence of courtroom disorder leading to contempt in the federal system is less than one-fifth of one percent of the criminal trials. *Disorder in the Court*, p. 8.

The Amicus must conclude that the vast increase in penalties for contempt cannot be justified. This increase has arisen from the arbitrary nature of the power itself. As Justice Black recognized in *Green* v. *United States*, 356 U.S. 165, 208-209 (1958), the Constitution and the Bill of Rights were adopted as checks upon such arbitrary powers in the hands of those in authority.

> "I cannot help but believe that this arbitrary power to punish by summary process as now used, is utterly irreconcilable with first principles underlying our Constitution and the system of government it created—principles which were uppermost in the minds of the generation that adopted the Constitution. Above all that generation deeply feared and bitterly abhorred the existence of arbitrary, unchecked power in the hands of any government official, particularly when it came to punishing alleged offenses against the state."

It is the absence of procedural limitations on the contempt power which is most directly responsible for the tremendous growth in penalties imposed over the years.

The summary contempt power has been perpetuated because it has generally been viewed as indispensable.

In the words of Chief Justice Taft, "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the Court is most important and indispensable." *Cooke* v. *United States*, 267 U.S. 517, 539 (1925). The necessity for this power is subject to question because the courts in Civil Law countries do not have such a power and yet continue to operate with success. Moreover, Civil Jurisprudence does not even recognize the Common Law concept of contempt. Pekelis, *Legal Techniques and Political Ideologies*, 41 Mich. L. Rev. 665 (1943). Clearly a judicial system would not stop functioning if it did not have a summary contempt power.

The Amicus does not contend that the contempt power be abolished. However, its summary nature should be foreclosed because other measures would be just as effective in controlling the course of a trial. The exercise of the contempt power must be "the least possible power adequate to the end proposed." *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966); *Anderson* v. *Dunn*, 6 Wheat 204, 231 (1821); *In re Michael*, 326 U.S. 224, 227 (1945).

The Amicus respectfully urges this Court to foreclose the summary nature of the contempt power by; 1) guaranteeing a jury trial to all alleged contemnors when imprisonment is contemplated; 2) by guaranteeing a full Due Process hearing at the conclusion of trial on the charges; 3) by requiring that a judge, other than the one before whom the allegedly contemptuous acts occurred, conduct the hearing.

If impartiality and fairness are to be the virtues of our courts then we must guarantee all criminal defendants those procedural safeguards upon which our system of laws is based. The demise of the summary nature of the contempt power will, in the long run, generate greater respect for our judiciary. We close this introduction with a statement of Justice Black in *Green* v. *United States*, 356 U.S. 165, 218 (1958):

> "In the last analysis there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state."

I

WHEN AN ALLEGED CONTEMNOR IS SENTENCED TO PUNISHMENT IN EXCESS OF THE REQUISITE AMOUNT TO ESTABLISH THE CONTEMPT AS A SERIOUS CRIME, THEREBY GUARANTEEING THE DEFENDANT THE RIGHT TO A TRIAL BY JURY ON THE CHARGES, THE TRIAL JUDGE AND THE APPELLATE COURT SHOULD NOT BE PERMITTED TO ALTER THE SENTENCE AT A LATER TIME TO FORECLOSE THE DEFENDANT'S RIGHT TO A TRIAL BY JURY.

At the end of trial, the judge sentenced the Petitioner on nine counts of contempt. The sentences, which ranged from thirty (30) days to one year, were ordered to be served consecutively. Thus, the Petitioner faced a total of fifty-four (54) months imprisonment. Apparently the trial judge realized that the one year sentences entitled Daniel Taylor to a jury trial on the charges.

Consequently the judge, although not until four months after he had sentenced Mr. Taylor, reduced the sentence for two specifications of contempt from one year each to six months each. This reduced the total sentence to forty-one (41) months and, as the judge erroneously assumed, also foreclosed the Petitioner's right to a trial by jury.

Unfortunately, the trial judge neglected to specify in his corrected judgment whether the sentences were to be served consecutively or concurrently. Applying the judge's intent at trial, where he ruled that the sentences were to be served consecutively, it could be surmised that this intent had not been changed. However, when the case was appealed by the Petitioner, the Court of Appeals of Kentucky held that because the sentences were not specified as to concurrently or consecutively, they were to be served concurrently. Thus, the sentence would be six months and for this reason Taylor did not have the right to a jury trial.

The Court of Appeals of Kentucky followed two recent decisions of substantial import which indicated that the reduced total sentence would still give Mr. Taylor the right to a jury trial. The Supreme Court in the case of *Bloom* v. *Illinois*, 391 U.S. 194 (1968), found contempt to be an ordinary crime and ruled that in determining the seriousness of the crime, for the purpose of the right to a jury trial, one looks to the penalty *actually imposed* as the best evidence thereof. In accordance with an earlier decision in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), applying the right to a jury trial to the states, the Court found that since the penalty actually imposed exceeded six months, the contempt was

a serious crime entitling the Petitioner therein to a trial by jury.

The Court of Appeals for the Seventh Circuit in the cases of *United States* v. *Seale*, 461 F.2d 345 (CA 7, 1972) and *In re Dellinger*, 461 F.2d 389 (CA 7, 1972), applied the decision in *Bloom* to the area of multiple petty contempts which had arisen out of the Chicago Seven conspiracy trial. They ruled that where a contemnor has been found guilty and sentenced to imprisonment for multiple petty contempts, the Court will aggregate the sentences, and the total sentence will be the *penalty actually imposed* for the purpose of determining the right to a jury trial.

However, in holding that under *Bloom*, *Seale* and *Dellinger*, the Petitioner did not have a right to a jury trial, the Court of Appeals completely overlooked the rules laid down in two of their recent decisions. In *Beasley* v. *Wingo*, Ky., 432 S.W.2d (1968) the Court held that sentencing was in the discretion of the trial judge, not the Appellate Court. In *McBride* v. *Commonwealth*, Ky., 432 S.W.2d 410 (1968) the same Court held that sentences which do not specify between concurrently or consecutively are to be served *consecutively*. The Court of Appeals of Kentucky neglected to either cite, overrule, or even comment on these two recent decisions precisely on point. One can only conclude that the Court of Appeals of Kentucky mistakenly overlooked these decisions and were in error in the Taylor decision. The Constitutional guarantee to a trial by jury is one of the most cherished rights a person has. Throughout our history this right has been jealously guarded by our Courts. We respectfully contend that the

Supreme Court of the United States should not countenance an after the fact alteration of a jail sentence by the trial judge, or an oversight, mistake, or error by the Court of Appeals of Kentucky to deny an attorney his Constitutional right to a trial by jury.

The Amicus believes that the original sentence should determine the seriousness of the crime and that later reductions in the sentence made in a spirit of merciful justice, do not alter that determination. Therefore, post-trial reductions in the sentence should not be allowed to infringe upon the accused's Constitutional right to a jury trial.

The decisions of this Court in *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), *Bloom* v. *Illinois*, 391 U.S. 194 (1968), and *Baldwin* v. *New York*, 399 U.S. 66 (1970), leave three loopholes through which an alleged contemnor may be denied his Constitutional right to a jury trial without violation of the letter of the above decisions. First, the Appellate Court can merely reduce the sentence imposed, as they did in this case, no matter how serious the trial judge viewed the crime. Second, the trial judge can rule that each citation for contempt was for a separate offense, whereupon the judge may impose multiple sentences of six months and thereby sentence the accused to a term far in excess of the penalty necessary to attach the jury trial requirement. The accused is denied the right to a jury trial because no one sentence on the separate crimes exceeds six months. Although the Seventh Circuit has ruled that the sentences on multiple petty contempts must be aggregated to determine whether the jury trial right attaches, *United States* v. *Seale*, 461 F.2d 345 (CA 7,

1972); *In re Dellinger*, 461 F.2d 389 (CA 7, 1972), the Supreme Court has yet to adopt the rule therein as a Constitutional standard. Third, since the appellate court can later reduce the sentence, thereby denying the contemnor the right to a jury trial, the accused can be severely chastized before the court, sentenced to a very long term of imprisonment, made to run a professional guantlet, and still be denied this basic Constitutional right.

In the case of Daniel Taylor, the trial judge did everything he could to impress upon the accused, the Bar and the community, the severity of Taylor's crime. The sentence that the judge imposed left no doubt about the seriousness of the offense. Taylor faced possible professional discipline or disbarment, loss of his clientele, and 54 months in prison. The judge in commenting upon Taylor's conduct said:

> "For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law . . .
>
> It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago." (T.R. 2288)

When the Court of Appeals of Kentucky handed down their opinion on appeal of the conviction, they characterized Taylor's actions thus; *Taylor* v. *Hayes*, Ky., 494 S.W.2d 737, 741 (1973):

> "There is no necessity of detailing the innumerable acts of Taylor which clearly reflected his contempt for the court as well as the judicial system of this Commonwealth. His actions were such as to place on trial the entire judicial system of the Com-

monwealth and those judges sworn to uphold its Constitution and laws and thereby assure defendants a fair, orderly, and speedy trial."

Yet, in spite of this, the Court of Appeals reduced the sentence to six months and ruled that Dan Taylor had not committed a serious crime which would entitle him to a jury trial. Apparently, the only fact that the Court of Appeals considered in ruling on the jury trial question was the reduced sentence. It is abundantly clear in this case that other extrinsic evidence firmly establishes the seriousness of the alleged offense.

The circumstances and actions which preceded the denial of a jury trial to the Petitioner in this case demonstrate the need for further changes in the Constitutional standards that govern this Sixth Amendment guarantee. Therefore the Amicus respectfully urges this Court to hold the following: 1.) The sentence originally imposed by the trial judge determines the seriousness of the crime and later reductions of the sentence do not affect that determination; and 2.) In the case of multiple petty contempts, the sentences must be aggregated to determine the seriousness of the crime for jury trial purposes.

Alternatively, the Amicus respectfully submits to this Court that there is no justification for denial of the right to a jury trial in any case where the accused faces imprisonment *possibly* in excess of 6 months.

This Court in *Bloom* v. *Illinois*, 391 U.S. 194 (1968) rejected the sui generis approach to the contempt power and held that contempt is a crime in the ordinary sense. Moreover, Justice White in the majority opinion felt that there were even more compelling reasons to

guarantee the right to a jury trial for contempt than for other crimes; *Bloom*, supra p. 201:

> "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperment. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court."

In *Frank* v. *United States*, 395 U.S. 147 (1969), Mr. Justice Marshall, speaking for the Court in a decision which held that it was not the *authorized* punishment but rather the *actual* punishment which was determinative of the right to a jury trial in the contempt context said:

> " . . . for purposes of the right to trial by jury, criminal contempt is treated just like all other criminal offenses. The defendant is entitled to a jury trial unless the particular offense can be classified as 'petty' ".

Frank presents a contradiction. While the Supreme Court ruled that contempt was to be treated the same as other crimes for the purpose of jury trial, in actuality, for all other crimes invocation of the right to a jury trial is predicated on the *possible* punishment not the *actual* punishment. Every accused contemnor, where the judge contemplates imprisonment, should be guaranteed the right to a jury trial on the theory that his maximum punishment is unlimited. Since this approach is Con-

stitutionally mandated for all other crimes, there seems to be no reason to treat the crime of contempt differently.

Wherefore, the Amicus respectfully urges the Court to reverse the conviction below and rule that an alleged contemnor must be guaranteed the right to a jury trial in all cases where imprisonment is contemplated.

II

THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW REQUIRES THAT IN ALL CONTEMPT SITUATIONS AN ALLEGED CONTEMNOR MUST BE PERMITTED TO SPEAK IN DEFENSE OR MITIGATION OF THE CHARGES AGAINST HIM, INCLUDING THOSE CONTEMPTS COMMITTED BY AN ATTORNEY IN THE PRESENCE OF THE TRIAL JUDGE, BEFORE HE IS ADJUDGED GUILTY AND SENTENCE IS IMPOSED.

At the conclusion of trial, the judge called the Petitioner before him and proceeded to sentence him on the contempt citations brought during the trial. The Judge openly attacked the Petitioner's character, his motives, and his professional qualifications and announced his intention to make an example of the Petitioner before the Bar and the local community. Before sentence was imposed upon the contempt citations, the Petitioner attempted to respond to the charges against him but was prevented from doing so to the extent that the Judge threatened to forcibly silence him (T.R. 2288-2290). At no time was the Petitioner allowed to say anything which might have affected the Judge's determination that criminal conduct had occurred for which the Petitioner was guilty, or that might

have mitigated the seriousness of his actions or the severity of the impending sentences.

This Court has recently held that one of the most fundamental principles of Anglo-American law is that "no one shall be punished without having had an opportunity to be heard in his defense." *Groppi* v. *Leslie*, 404 U.S. 496 (1972); following: *In re Oliver*, 333 U.S. 257 (1948); *In re Hammersmith*, 4 EX. 87, 96, 154 Eng. Rep. 1136, 1140 (1849). That the opportunity to be heard in defense or mitigation of a crime is a pre-requisite of Due Process cannot be doubted. "The fundamental requisite of Due Process is the opportunity to be heard". *Grannis* v. *Ordean*, 324 U.S. 385 (1914).

This principle is known as *audi alteram partem* ("hear the other side", *Black's Law Dictionary*, 4th Edition, p. 166). The principle is also basic to the Common Law in England. Indeed there is some evidence that it predates the Common Law and originated out of the Judeo-Christian traditions of our Anglo-American society. In the case of *The King* v. *the Chancellor, Masters and Scholars of the University of Cambridge*, 1 STR. 557, 93 Eng. Rep. 698 (1723), Mr. Justice Fortescue traced this principle back to the Garden of Eden saying:

> "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence."

In the case of *In re Pollard*, 5 Moore P.C. (N.S.) 111, 16 Eng. Rep. 457 (1868) the English Courts extended the principle to the direct contempt situation. There, the

Court held that the granting of an opportunity to make a statement in defense of the charges was essential before a sentence of contempt, even when the contempt arose out of repeated actions in open court. The principle of the Pollard case was affirmed as recently as 1958, in the case of *Samaratunga* v. *the Queen*, (1958) A.C. 424, 432. As Judge Friendly said in *United States* v. *Galante*, 298 F.2d 72, 77 (CA 2, 1972):

> "Thus has Blackstone's much quoted statement, 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination,' 4 Com. 286, been qualified in the land that gave it birth."

It appears that there have been only two cases wherein the Supreme Court has addressed the question of the contemnor's right to allocution; *Groppi* v. *Leslie*, 404 U.S. 496 (1972) and *Ex Parte Terry*, 128 U.S. 289 (1888). The *Terry* case dealt with a direct contempt that was summarily decided in open court. The accused was not afforded the right to speak in his defense. There, the Supreme Court said that the trial court was not bound to hear any explanation of the contemnor's actions

. . . .

> " . . . if it was satisfied—and we must conclusively presume, from the record before us, that it was satisfied, from what occurred under its own eye and within its hearing—that the ends of justice demanded immediate action, and that no explanation could mitigate his offense, or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment." *Terry*, Supra p. 309-310.

However, the *Terry* case was decided more than 80 years ago. Since that time there has been a vast expansion of Due Process in areas less significant than the potential imprisonment of the Petitioner herein.

The Court in *Weiss* v. *Burr*, 484 F.2d 973, 985 (CA 9 1973) characterized this change thus:

> " . . . in the decades since *Terry* was decided, there has, without question, been a marked increase in the Supreme Court's sensitivity to procedural due process. The mainstream of the decisions involving that doctrine is now, and for some years has been, represented by the cases which require that notice and hearing be granted before deprivations of liberty or property take effect. The importance of notice and meaningful opportunities to be heard has been recognized in criminal proceedings and in numerous areas involving issues less significant than the loss of liberty and the damage to Weiss's professional hopes which are threatened here."

There are two generally recognized justifications for the exercise of the summary contempt power. First, the power may be used when it becomes necessary to preserve order in the court and the integrity of the judicial process. Second, the summary power may be used by the trial judge to prevent the waste of judicial resources when he has personally witnessed the conduct in question, *United States* v. *Meyer*, 462 F.2d 827, 831 (CA DC 1972). We are concerned here with the first justification of preserving order in the courtroom.

This Court held while reversing the conviction of the petitioner in the case of *Groppi* v. *Leslie*, 404 U.S. 496 (1972) that where the defendant had committed an indirect contempt, a legislature could not summarily con-

vict the petitioner because there was no justification for the summary procedure employed.

> " . . . Indeed, we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.' "

The *Groppi* case is more applicable to the case of Daniel Taylor than *Terry*, because the judge postponed the sentencing of Mr. Taylor until the end of trial. Thus, as in *Groppi*, supra, there was no justification for proceeding summarily and denying the accused the right to speak in defense or mitigation of his crime.

The Court of Appeals for the Ninth Circuit in the case of *Weiss* v. *Burr*, 484 F.2d 973 (CA 9 1973), adopted the above rationale and reversed the conviction of a direct contemnor who had been convicted and sentenced without an opportunity to speak in his defense. The Court there ruled that the right of allocution was fundamental to Due Process and said:

> "Since the distinctions between this case and Groppi are essentially meaningless, that case is, as we view it, controlling. It requires us to hold that because the trial judge delayed the disposition of the citations, and at the time of sentencing was not acting to quell a courtroom disruption to preserve the dignity of the court, or to protect the safety of court personnel, allouction was required and its denial was violative of procedural due process."

Since the trial judge delayed disposition of the contempt charges against the Petitioner until the end of the trial, the first justification for the summary power—that of preserving order in the courtroom—did not exist.

Therefore, the Petitioner was denied his Constitutional right to Due Process of Law when he was summarily convicted and prevented from speaking in defense or mitigation of the crime.

The Amicus respectfully urges the Court to rule that for all contempt citations the accused has a Constitutional Due Process right to speak in defense or mitigation of the charges before the imposition of sentence. Moreover, in keeping with our belief that the summary nature of the contempt power should be foreclosed, we respectfully submit that the Court should rule that in all prosecutions for contempt, the accused will be guaranteed the right to a full Due Process hearing on the charges at the conclusion of trial. As we have suggested elsewhere in this brief, the contempt power would be just as effective if its exercise were limited to the bringing of a citation for contempt by the trial judge which must be adjudicated at the conclusion of trial in a full Due Process hearing presided over by a judge other than the trial judge.

On balance, the reasons for the continued existence of the summary contempt power do not justify the denial of a Due Process hearing on the charges because lesser measures would suffice. The inequity of the situation is especially evident when we compare contempt to other crimes. Only the offense of contempt may be punished without a hearing. All other offenses require, at minimum, a full Due Process hearing.

This Court has greatly expanded the range of Due Process procedural rights over the years. Today, even in many non-offense situations, this Court has ruled that Due Process requires a hearing as a buffer between the

indivudal citizen and the government. For example, the Supreme Court has recently held in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970) that the Due Process clause of the Fourteenth Amendment requires that the states afford an evidentiary hearing to welfare recipients before termination of their benefits; and in *Fuentes* v. *Shevin*, 407 U.S. 65 (1972), that Due Process requires a hearing before state repossession of goods on default of a buyer under a conditional sales contract. If the Due Process Clause of the Fourteenth Amendment guarantees a hearing before the deprivation of a property right, even in a civil action, then surely the time is long overdue that Procedural Due Process be guaranteed to alleged contemnors before criminal penalties can be imposed.

Wherefore, the Amicus respectfully urges the Court to reverse the decision below and guarantee to all future alleged contemnors the Constitutional right to a full Due Process hearing before conviction and imposition of sentence.

III

IN THE CIRCUMSTANCES OF THIS CASE THE TRIAL JUDGE COULD NOT IMPARTIALLY SIT IN JUDGMENT ON MULTIPLE CONTEMPT CHARGES AGAINST THE PETITIONER.

Perhaps the most fundamental and essential Due Process right guaranteed to a criminal defendant is the right to a fair trial before an impartial magistrate. The Petitioner was denied this Constitutional right when the trial judge passed sentence upon him at the conclusion of trial because the trial judge, justified or not, had adopted an *adversary posture* towards the Petitioner.

This adversary posture was evidenced by certain disparaging remarks made by the trial judge about Daniel Taylor and the unusual manner in which sentence was passed (T.R. 2288-2290).

When the trial judge sentenced the Petitioner at the conclusion of the trial, he stated that it was a shame he would have to do something that the Bar Association should have done years ago. He further stated his intention to make Daniel Taylor an example to the Bar and the local community:

> "It's a shame that this Court has to do something that the Bar Association of this State should have done a long time ago.
>
> "As far as a lawyer is concerned, you're not. I want the jury to hear this, that you're not the rule, you're the exception to the rule." (T.R. 2289)

The trial judge's open and frank statement that he was going to make the Petitioner an "example" would obviate any conclusion that the judge had remained detached and disinterested enough to give the Petitioner a fair trial before an impartial magistrate.

It was the carefully considered opinion of the Court of Appeals of Kentucky, in the decision below, that the conduct of the trial judge did not prejudice the Due Process rights of the contemnor and that there was no evidence of bias which would disqualify him from exercising his summary contempt power. The Court of Appeals applied the relevant decisions of this court and found that the trial court was not an activist seeking combat with Taylor nor "did Daniel Taylor ever indulge in any personal attacks of any kind upon the judge." *Taylor* v. *Hayes*, Ky., 494 S.W.2d 739, 744 (1973);

following: *Offut* v. *United States*, 348 U.S. 11 (1954); *Mayberry* v. *Pensylvania*, 400 U.S. 455 (1971); and *Ungar* v. *Sarafite*, 376 U.S. 575 (1964). They concluded that as long as the judge avoided becoming personally embroiled in controversy with the contemnor and the contemnor had not personally attacked the judge, they were not constrained to find bias or prejudice in the trial judge's conduct. The standard that the Court of Appeals of Kentucky applied to the conduct of the judge was not Constitutionally stringent enough to determine whether Due Process had been violated because they failed to consider whether the judge had adopted an adversary posture towards the contemnor. The case of *United States* v. *Meyers*, 462 F.2d 827 (CA DC 1972), requires disqualification of the judge where he has adopted an adversary posture towards the contemnor. In *Meyer* the Court of Appeals for the Seventh Circuit, in applying the case of *In re Murchison*, 349 U.S. 133 (1955) said:

> "The Due Process requirement of disposition by an impartial judge is threatened, not only when the contempt is of such a personal nature as to create actual embroilment or the likelihood of personal engagement of the feelings of the trial judge, but also when the judge adopts an adversary posture with respect to the alleged contemnor, even if he has not been personally attacked. *In re Murchison*, 349 U.S. 133, (1955)."

The adversary posture of the trial judge as evidenced by his actions and remarks creates a sufficient possibility of bias to make disqualification of the trial judge necessary to preserve the integrity of the judiciary and to protect the Due Process rights of the accused to a fair

trial before an impartial magistrate. *United States* v. *Meyer*, supra, p. 841.

The Amicus respectfully submits to this Court that if the right to a fair trial before an impartial judge is to be guaranteed in the contempt situation, then the judge before whom the alleged contempt took place should not be allowed to conduct the post-trial hearing on the charges or to pass sentence on the contemnor. When our judicial system places the roles of complainant, prosecutor, judge, jury and disciplinarian upon the shoulders of the same judge who must bear the brunt of the criminal conduct, and then demands that this same judge remain fair and impartial, that judicial system places too heavy a burden upon one man. No judge should be required to bear this burden.

The psychology of our jurisprudence views the judge and the court as one and the same. These words are used interchangeably in our language to identify the institution of the court when in session. Not only do citizens and attorneys who stand apart from the court view it in this manner, but the judge views himself as the personification of the court and the protector of our most sacred institution. Not only does the contemnor characteristically view his conduct as against the judge, the judge himself will frequently interpret any attack upon the court as a personal attack. Justice Jackson in his opinion in *Sacher* v. *United States*, 343 U.S. 1, 12 (1952) recognized the problem.

> "It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge

and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other."

Any judge who presides at trial and is called upon to punish contemptuous conduct would have difficulty remaining fair and impartial were he the most virtuous of men. All men suffer from human weaknesses and the men upon whom we place the responsibility of protecting our courts are no exception Justice Frankfurter outlined this human dimension in his opinion in *Sacher* v. *United States*, 343 U.S. 1, 35 (1952):

> "But precisely because a judge is human, and in common frailty or manliness would interpret such conduct of lawyers as an attack on himself personally, he should not subsequently sit in judgment on his assailants, ..."

This human dimension is not limited to the possibility that a judge may view contempt of the court as a personal attack. As Justice Black said in his dissent in *Green* v. *United States*, 356 U.S. 165, 198 (1958):

> "Like all the rest of mankind they (Judges) may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding, or by excessive zeal."

Under our present system we assume the objectivity of the judge to such an extent that the alleged contemnor is put at a great disadvantage. The trial judge may act on the contempt charges he prefers unless the contemnor can show that the judge adopted an adversary posture towards him, became personally embroiled in controversy with him, or was vehemently attacked by

him. *Mayberry* v. *United States*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *United States* v. *Meyer*, 462 F.2d 827 (CA DC 1972).

It would be more realistic to assume that no trial judge before whom allegedly contemptuous acts are committed can properly and fairly conduct a summary contempt proceeding in a manner that would conform to the fair trial before an impartial magistrate test of Due Process. Moreover one theory may be asserted which amounts to a logical truism: the judge in whose court the alleged contempt occurs is the judge least likely to deal fairly with the alleged contemnor.

Another characteristic of contempt makes it particularly difficult to deal with. Allegedly contemptuous conduct most often arises out of passion and may thus most readily arouse passionate responses in judges. When the same judge who witnesses this conduct decides upon its criminality, then the nature of the crime of contempt is made to depend on the temperance of the individual judge. Edward Livingston saw this problem long ago in his treatise on the penal laws of this country; 1 *Edward Livingston Works* 263 (1873):

> "Judges (although by vesting them with this power we treat them as angels) are men; their passions will more readily be roused by real or fancied insults than they would be by injuries, and nothing can be more at war with justice than passion. Another evil—there is no end to them—is, that from the nature of the crime, its existence must depend on the temper of the judge who happens to preside. Words which a man of cool and considerate disposition would pass over without notice might trouble the serenity of another more susceptible in his feel-

ing or irritable by his nature. There is no measure of the offense but the ever-variable one of the human mind. The judge carries the standard in his own breast."

Under the recent decisions of this Court relative to the right to an impartial magistrate which were previously cited, a parádox arises. If the alleged contemnor's behavior is serious or offensive enough to raise the presumption of judicial bias then another judge is assigned to conduct the hearing. If the allegedly contemptuous behavior is not provocative enough to raise this presumption then the contemnor must face the same judge before whom the actions occurred and all the dangers to the defendant's Due Process rights that have been cited above come into play. Where the alleged contemnor has enough restraint to prevent his acts from becoming personal attacks, the situation remains potentially appropriate for a denial of the contemnor's Constitutional right to a fair trial before an impartial magistrate. In effect, the accused is penalized for his restraint. This inequitable paradox and the dangers to an alleged contemnor's Due Process right could be cured if this Court would adopt the recommendation of the Amicus that the trial judge before whom the allegedly contemptuous actions occurred, not be allowed to conduct a hearing on the charges or impose sentence upon the contemnor.

As an alternative, the Amicus suggests a system under which the trial judge would inform the contemnor that his actions were being cited for contempt. This citation would have the same effect as an indictment and would be adjudicated at a post trial hearing conducted

by another judge. The Amicus believes that a citation for contempt during trial would have an equally deterrent effect upon the conduct of the contemnor as the threat of an immediate judgment during trial.

The assertion that the threat of immediate punishment is a more effective deterrent than the threat of punishment inflicted somewhat later, is a highly speculative one. Even shorter arguments in favor of expeditious handling of accused persons have been rejected in favor of procedural fairness in matters of police investigative techniques, *Escobedo* v. *Illinois*, 378 U.S. 478, 490 (1964) and the right to representation by counsel, *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963).

The threat of subsequent criminal action, and in the case of an attorney, the additional threat of professional disciplinary hearings, should be sufficient to control contumacious behavior in most cases. In the case of litigants the recent decision in *Illinois* v. *Allen*, 397 U.S. 337, 344 (1970) allows the court wide latitude for dealing physically with a disruptive defendant in a criminal trial:

> "We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."

In the case of an attorney, if the threat of subsequent criminal action and professional discipline are not enough to restrain him, in those instances where the disruption is so great that it threatens the validity of the trial, it would be better to declare a mistrial and then

cite the attorney for contempt. This would protect the defendant and prevent a complete retrial of a long case after a reversal by an appellate court. Otherwise, the court must bear the burden of a continuous contest between the attorney and the authority of the court resulting in a detriment to all parties involved and the possibility of prejudicing the jury.

If the attorney should continue his contemptuous behavior after the conclusion of the criminal hearings on contempt and professional disciplinary hearings, the judge should then appoint another attorney or allow the defendants to obtain other counsel.

The standards of fairness that the Supreme Court has applied to the contempt situation in *In re Murchison*, 349 U.S. 133, 136 (1955), are rigorous.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome . . . Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law . . . But to perform its high function in the best way. 'Justice must satisfy the appearance of Justice.' ".

This rigorous standard of fairness would best be served if the trial judge were not allowed to sit in judgment of allegedly contemptuous acts committed before him during trial.

Wherefore, the Amicus respectfully urges this Court to reverse the Conviction below because the Petitioner was denied his Constitutional right to a Fair Trial before an Impartial Magistrate as guaranteed by the Sixth and Fourteenth Amendments to the Constitution.

CONCLUSION

This case presents a valuable opportunity for the Court to reconsider the balance between the summary power of contempt and the Constitutional Due Process rights of alleged contemnors. The Amicus believes that the summary nature of the contempt power should be foreclosed because it is in excess of the power actually needed to fulfill the end proposed and is often abused. Lesser measures, which do not contravene the accused's Constitutional rights, would provide equal deterrence to contumacious conduct during trial.

Wherefore, the Amicus respectfully urges the Court to reverse the decision below and therein further restrain the summary power of contempt.

Respectfully submitted,

FRANK E. HADDAD, JR.
JOE G. LEIBSON
Counsel for Amicus,
Louisville Bar Association

Of Counsel:

ED P. JACKSON

JAN 17 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-473

DANIEL T. TAYLOR, III,

Petitioner,

—v.—

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

BURKE MARSHALL
Yale University
Law School
New Haven, Connecticut

LEON FRIEDMAN
Committee for Public Justice
22 East 40th Street
New York City, N. Y. 10016

NORMAN DORSEN
NYU Law School
40 Washington Square, South
New York City, N. Y. 10012

Attorneys for the Association of the Bar of the City of New York
42 West 44th Street
New York, New York 10036

INDEX

PAGE

Interest of the Amicus Curiae 1

Statement of the Case 3

Summary of Argument 3

ARGUMENT:

POINT I

The summary criminal contempt power violates the due process clause of the Fourteenth Amendment 5

A. The summary contempt power contains great opportunities for abuse and has been severely circumscribed in recent years 6

B. The potential for abuse in summary contempt proceedings has in fact been realized 13

C. The summary contempt power is not necessary to maintain order in the court 16

POINT II

The trial judge below was required to refer the contempt proceedings to another judge for a full due process hearing 22

A. The trial judge could not impartially sit in judgment of the contempt charges against petitioner 22

PAGE

B. Petitioner was entitled to a jury trial because of the seriousness of the offense with which he was charged 26

C. A proper hearing was not afforded the petitioner below 30

CONCLUSION 35

TABLE OF AUTHORITIES

Cases:

Anderson v. *Dunn*, 6 Wheat. 204 6

Bloom v. *Illinois*, 391 U.S. 194 (1968) 7, 8, 13, 15, 20, 27

Brown v. *United States*, 356 U.S. 148 (1958) 32

Cheff v. *Schnackenberg*, 384 U.S. 373 (1966) 27

Commonwealth v. *Patterson*, —— Pa. ——, 308 A.2d 90 (1973) 21

In re Dellinger, 461 F.2d 389 (7th Cir. 1972) 11

Duncan v. *Louisiana*, 391 U.S. 145 (1968) 26

Frank v. *United States*, 395 U.S. 147 (1969) 26

Green v. *United States*, 356 U.S. 165 (1958) 7, 8, 15

Grizzell v. *Wainwright*, 481 F.2d 405 (5th Cir. 1973) 11

Groppi v. *Leslie*, 404 U.S. 496 (1972) 30, 32

Harris v. *United States*, 382 U.S. 162 (1965) 9

Holt v. *Virginia*, 381 U.S. 131 (1965) 9

PAGE

Illinois v. *Allen*, 397 U.S. 337 (1970) 4, 6, 17

Johnson v. *Mississippi*, 403 U.S. 212 (1971) 10, 22

Laughlin v. *Eicher*, 145 F.2d 700 (D.C. Cir. 1944) 18
In re Little, 404 U.S. 553 (1972) 6, 10

Mayberry v. *Pennsylvania*, 400 U.S. 455 (1971) 6, 10, 22
In re McConnell, 370 U.S. 230 (1962) 6, 7, 9, 32
In re Michael, 326 U.S. 224 (1945) 6
Mullane v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950) 30

Offutt v. *United States*, 348 U.S. 11 (1954) 9, 22, 25

Panico v. *United States*, 375 U.S. 29 (1963) 9
People v. *Tecza*, 4 Ill. App. 2d 1058, 283 N.E. 2d 111 (1972) 14
People v. *Tomashevsky—Appeal of Boudin*, 48 Ill. 2d 559, 273 N.E. 2d 398 (1971) 14

Sacher v. *United States*, 343 U.S. 1 (1952) 14, 16, 17
State v. *Browder*, —— Alaska ——, 486 P.2d 925 (1971) 12

United States ex rel. Robson v. *Oliver*, 470 F.2d 10 (7th Cir. 1972) 11
United States v. *Marra*, 482 F.2d 1196 (2d Cir. 1973) .. 11
United States v. *Meyer*, 462 F.2d 827 (D.C. Cir. 1972) 11, 25
United States v. *Meyer*, 346 F. Supp. 973 (D.D.C. 1972) 15
United States v. *Seale*, 461 F.2d 345 (7th Cir. 1972) ..11, 29, 32

PAGE

United States v. *Wilson and Bryant,* —— F.2d —— (2d Cir. Nov. 28, 1973) 11-12, 33

Ward v. *Village of Monroeville,* 409 U.S. 57 (1972) .. 16
Weiss v. *Burr,* 484 F.2d 973 (9th Cir. 1973) 11, 33

STATUTORY PROVISIONS

Connecticut Public Act No. 770 (1971) 21
Kentucky Revised Statute 432.260 21

OTHER AUTHORITIES

Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice, *The Judge's Role in Dealing with Trial Disruptions (1971)* 35
N. Dorsen and L. Friedman, DISORDER IN THE COURT: Report of the Association of the Bar of the City of New York (1973) 3, 14, 18, 20
Note, "Criminal Law—Contempt—Conduct of Attorney During Course of Trial," 1971 Wisconsin Law Review 329 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-473

DANIEL T. TAYLOR, III,

Petitioner,

—v.—

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Association of the Bar of the City of New York files this brief pursuant to Rule 42 of the United States Supreme Court. Both Petitioner and Respondent have consented to the filing of this brief and copies of the consents of Petitioner and Respondent have been filed with the Clerk of this Court.

Interest of the *Amicus Curiae*

The Association of the Bar of the City of New York ("The Association") has a membership of 10,200 attorneys admitted to practice in New York and elsewhere. The Association was established by Act of the New York State

Legislature in 1871. Laws 1871, Chapter 819; Amended Laws 1924, Chapter 134. Its stated statutory purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof."

In 1970, the Association appointed a Special Committee on Courtroom Conduct to study and report on the extent and causes of courtroom disorder which were of such wide concern at the time and to suggest how the judicial system and the legal profession might deal with these problems. Ten members of the Association were appointed to the Committee (one later resigned because of the press of other business). Burke Marshall, former Assistant Attorney General and now Professor of Law at the Yale Law School, acted as Chairman. Other members included a former New York Court of Appeals judge, a former President of the City Bar Association, a law school dean and a present sitting federal judge.

The Committee and its staff worked for two and one-half years on its study. Four consultants prepared special papers, and many persons with expertise and first-hand knowledge of the problem appeared before the Committee. Other experts on different phases of the problem were interviewed. A detailed questionnaire on courtroom disorder was sent to every trial judge of general jurisdiction in the nation (over 4,600) and 1,602 responded. Questionnaires were also sent to every United States Attorney, the district attorneys of the seventy largest jurisdictions, the Attorneys General of every state, and the presidents of the

eighty-nine largest bar associations in the nation.* Every published case of courtroom disorder was analyzed.

The Committee has recently published its final report under the title DISORDER IN THE COURT which contains its analysis of the problems and its suggestions for remedial action to preserve orderly judicial procedures and the integrity of the courtroom. The Association believes that the Committee's findings and conclusions may be helpful to the Court in determining the legal issues presented on this appeal.

Statement of the Case

Amicus incorporates the statement of the case as outlined by the Petitioner.

Summary of Argument

I.

The courts must have effective sanctions for protecting themselves against disruption of their proceedings. However, the summary contempt power is so inconsistent with the requirements of due process that it should no longer be used to maintain order in the court. In recognition of

* The questionnaire returns indicated that courtroom disorder was not a serious quantitative problem in American courts. Of the 1,602 judges who responded only 107 reported that they had experienced a total of 112 cases of trial disruption in their entire lives on the bench. Similar conclusions were drawn by the United States Attorneys, district attorneys, Attorney Generals and bar association presidents. Where disorder did occur, defendants were primarily responsible. Lawyers accounted for a very small proportion of courtroom disruption. See N. Dorsen and L. Friedman, DISORDER IN THE COURT, Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct (hereinafter "DISORDER IN THE COURT") 5-7, 268-332 (1973).

the abuses of the summary contempt power, this Court has greatly circumscribed its use in recent years. A sentence greater than six months can no longer be imposed, judges who are personally embroiled with an alleged contemnor cannot impose punishment upon him, and judges who have been insulted by a defendant cannot wait until the end of trial to hold him in contempt.

However, these restrictions are not enough. Time and time again judges have imposed severe and arbitrary punishment on defendants and lawyers in summary contempt proceedings. This has been done not only when an alleged contempt was considered a direct insult to the court or the judge, but also when a lawyer merely engages in vigorous advocacy. Too often a judge merely seeks retribution after a dispute with a party. The need for an impartial tribunal to hear a contempt requires that all contempts be heard by someone who is not acting as prosecutor of the charges.

The summary contempt power is not necessary to maintain order in the court. Under *Illinois* v. *Allen,* 397 U.S. 337 (1970) a trial judge may cite a defendant for contempt (to be heard later by another judge), remove him from the courtroom, or bind or gag him. These are effective, immediate sanctions to protect the ongoing proceedings of the court. A lawyer may also be cited for contempt (to be heard after the trial by another judge) and he faces the possibility of suspension and disbarment. Thus, summary contempt is not necessary to deter lawyers from misbehaving in court. Respect for the courts is engendered not by the fear of unlimited authority but by fair, due process procedures.

II.

Even if this Court does not find that summary contempt per se violates the due process clause, it must still reverse the judgment below since (1) the judge was personally embroiled with the petitioner; (2) the 54 month sentence originally imposed was a recognition of the seriousness of the offense which, therefore, required a jury trial; and (3) a proper hearing was not afforded the petitioner.

ARGUMENT

POINT I

The summary criminal contempt power violates the due process clause of the Fourteenth Amendment.

We start with the proposition that orderly justice is an absolute prerequisite for a functioning democracy. The courts are perhaps the most important protection of the rights of the citizens, but they cannot perform that function in an atmosphere of disorder, uproar or turmoil. The courts simply must have efficient sanctions for protecting themselves against disruption of their procedures. Justice Brennan has written:

> Constitutional power to bring an accused to trial is fundamental to a scheme of "ordered liberty" and prerequisite to social justice and peace . . . [the nation] cannot endure if in individual cases the claims of social peace and order on the one side and of personal liberty on the other cannot be mutually resolved in the forum designated by the Constitution. If that resolution cannot be reached by judicial trial in a court of law, it

> will be reached elsewhere and by other means, and there will be grave danger that liberty, equality and the order essential to both will be lost. *Illinois* v. *Allen*, 397 U.S. 337, 347, 348 (1970) (Brennan, J. concurring).

However, this does not mean that courts may impose sanctions for courtroom misconduct in a manner contrary to the basic principles which the courts are designed to protect. It would be anomalous to say that while the courts must afford due process of law to all those who come before them, they can deny that same due process to those who in any way threaten the order of the courtroom. The basic due process requirements of notice, hearing, an unbiased judge and a jury trial where appropriate cannot be dispensed with because the offense involved is labeled contempt of court.

A. *The Summary Contempt Power Contains Great Opportunities for Abuse and Has Been Severely Circumscribed in Recent Years.*

This Court has often spoken about the dangers of the summary contempt power. The Court wrote in *In re Michael*, 326 U.S. 224, 227 (1945) that federal courts, in contempt cases, must be limited "to 'the least possible power adequate to the end proposed.' *Anderson* v. *Dunn*, 6 Wheat. 204, 231. The exercise by federal courts of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights."* In

---

* This Court has not made any distinction in reviewing summary contempt procedures of state and federal courts and has imposed the same due process requirements on both. Compare *In re McConnell*, 370 U.S. 230 (1962) and *In re Little*, 404 U.S. 553 (1972). This Court said in *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971): "Whether the trial be federal or state, the concern of due process is with the fair administration of justice."

the case of *In re McConnell,* 370 U.S. 230, 236 (1962) this Court said: "To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice."

Anticipating this Court's decision in *Bloom* v. *Illinois,* 391 U.S. 194 (1968), Justice Black wrote in dissent in *Green* v. *United States,* 356 U.S. 165, 193-94 (1958):

> The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law . . . [This] power . . . has aptly been characterized by a State Supreme Court as "perhaps, nearest akin to despotic power of any power existing under our form of government." [citing State ex rel. Ashbaugh v. Circuit Court, 97 Wis. 1, 8, 72 N.W. 193, 194-95.] Even though this extraordinary authority first slipped into the law as a very limited and insignificant thing, it has relentlessly swollen, at the hands of not unwilling judges, until it has become a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society.

Justice Black pointed out that the essential vice of the summary contempt power is that it enables a judge to combine in one person a variety of functions in a criminal case.

> When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge, he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially

> on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. . . . "To this end no man can be a judge in his case and no man is permitted to try cases where he has an interest in the outcome . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." 356 U.S. at 199.

This position was followed by this Court in *Bloom* v. *Illinois*, 391 U.S. 194 (1968). The Court held that serious criminal contempt cases were subject to the jury trial provisions of the Sixth Amendment as applied to the states through the Fourteenth Amendment. The Court noted "the potential for abuse which resides in the summary power to punish for contempt." 391 U.S. at 204. It pointed out the many ways in which courts and legislatures had "eroded the power of judges to try contempts of their own authority." 391 U.S. at 207. The Court held:

> Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. . . . Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury trial provisions of the Constitution apply. . . . We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial dif-

ference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court. 391 U.S. at 201-202.

Bloom established that any sentence in excess of six months cannot be imposed for any contempt by a state or federal court without the intervention of a jury. In a series of other cases, however, the Court also imposed additional restrictions on the power of a trial judge to sentence through summary contempt procedures. In *Offutt* v. *United States,* 348 U.S. 11, 17 (1954) the Court held that a trial judge who becomes "personally embroiled" with an alleged contemnor cannot hold him in contempt even though the sentence was only ten days. In *In re McConnell,* 370 U.S. 230 (1962) the Court held that no contempt may be punished unless there is an actual obstruction of justice. In *Panico* v. *United States,* 375 U.S. 29 (1963) the Court held that a summary contempt proceeding was inappropriate for an alleged contemnor who showed indications of mental illness. In *Holt* v. *Virginia,* 381 U.S. 131 (1965) the Court reversed a summary contempt fine of only $50 imposed upon a lawyer for filing a vigorously-worded motion for change of venue which charged the trial judge with bias. In *Harris* v. *United States,* 382 U.S. 162 (1965) the Court

established that summary contempt was not available as a sanction against a grand jury witness who refused to answer questions put to him by the grand jury and who repeated his refusal after being brought before a federal judge. A district court could impose punishment only through a full due process hearing under rule 42(b) of the Federal Rules of Criminal Proceduce.

This Court imposed a new rule for summary contempts in *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971). In that case a pro se defendant had cruelly and continuously insulted the trial judge throughout the proceedings. After the verdict, the judge held the defendant in contempt and sentenced him to a term of 11 to 22 years for these contempts. This Court reversed. It held that where a judge "does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place. . . . [A] judge, vilified as this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." 400 U.S. at 463, 464, 465.

In its most recent cases on the subject, the Court reversed a summary contempt sentence in *Johnson* v. *Mississippi*, 403 U.S. 212 (1971) since it was not clear that the trial judge had personally observed the action which served as the basis for the contempt citation. There was also evidence of bias by the judge. "Trial before 'an unbiased judge' is essential to due process." 403 U.S. at 216. In *In re Little*, 404 U.S. 553 (1972) this Court unanimously reversed a summary contempt conviction imposed by a state court

after a pro se defendant had accused the judge of prejudice against him.

Many lower federal courts have followed this Court's lead and have imposed greater restrictions on the summary contempt power. In *United States* v. *Marra*, 482 F.2d 1196 (2d Cir. 1973) the Second Circuit held that a witness could not be punished summarily by contempt for refusing to answer a question put to him during a criminal trial in the presence of a jury. In *United States* v. *Meyer*, 462 F.2d 827, 845 (D.C. Cir. 1972), the District of Columbia Circuit held an alleged contempt "which consists of an impugnation of the integrity and impartiality of the trial judge is sufficiently personal to invoke the *Mayberry* doctrine." In such a case a defendant "is entitled to have the contempts charged against him adjudicated in a full hearing before a different judge." In *United States* v. *Seale*, 461 F.2d 345 (7th Cir. 1972) the Seventh Circuit held that a trial judge cannot hold a person in summary contempt after the declaration of a mistrial. The Court also held that "where the judge waits to act until a mistrial or the end of a trial, consecutively imposed sentences for contemptuous conduct occurring during the course of the preceding trial must be cumulated to determine the defendant-contemnor's right to a jury trial." 461 F.2d at 356. If the total is more than six months, a jury trial is necessary. In *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972) the Seventh Circuit held that the *Mayberry* rule applies as well to lawyers as to defendants who commit a contempt. And in *Grizzell* v. *Wainwright*, 481 F.2d 405 (5th Cir. 1973) the Fifth Circuit held that *Mayberry* should be given retroactive application. See also *Weiss* v. *Burr*, 484 F.2d 973 (9th Cir. 1973); *United States ex rel. Robson* v. *Oliver*, 470 F.2d 10 (7th Cir. 1972); *United*

States v. *Wilson and Bryant*, —— F.2d —— (2d Cir. November 28, 1973).

State courts have also re-examined the summary contempt power and imposed restrictions on its use. The Supreme Court of Alaska held in *State* v. *Browder*, —— Alaska ——, 486 P.2d 925 (1971) that in any criminal proceeding (including contempt) which may lead to incarceration, a defendant is entitled to a jury trial.

> We hold that direct criminal contempts must be treated like any other criminal prosecution for purposes of the right to jury trial under article I, section 11 of the Alaska Constitution. . . . it is clear that a criminal contempt proceeding is criminal prosecution within article I, section 11 of the Alaska Constitution. In the instant case, we believe that considerations of convenience and expediency to the state are convincingly outweighed by the right of an individual to be convicted only by means which are fundamentally fair. We therefore hold . . . that article I, section 11 of the Alaska Constitution guarantees the accused the right to jury trial for a direct criminal contempt. 486 P.2d at 973.

In summary, as a matter of federal constitutional law, the power of summary contempt has been restricted as follows:

1. Under *Bloom*, no sentence of greater than six months can be imposed for contempt without a jury.

2. Under *Offutt*, no judge who is personally embroiled with the alleged contemnor can sentence him for contempt.

3. Under *Mayberry*, a judge who is insulted or abused by a defendant cannot wait until the end of the trial to sentence for contempt.

4. Under *Meyer* and *Dellinger*, the *Mayberry* rule applies to lawyers as well as defendants.

5. Under *Seale*, consecutively imposed sentences for contempt handed down at the end of a trial must be cumulated to determine the right to a jury trial.

B. *The Potential for Abuse in Summary Contempt Proceedings Has in Fact Been Realised.*

This Court emphasized in *Bloom* the potential for abuse that is present in summary contempt proceedings. In fact these abuses have often occurred. Time and time again judges have imposed severe and arbitrary punishment on defendants and lawyers. As noted earlier, the defendant in the *Mayberry* case received a sentence of eleven to twenty-two years. No matter how outrageous the defendant's words were in court, that sentence imposed by the judge who was their target is excessive. In the present case petitioner Taylor was originally sentenced by the trial judge to four-and-a-half years for contempt (later reduced to three-and-a-half years) for his actions in defending the murder case of two black youths. The judge's comments show quite clearly that he felt personally affronted by what occurred in his courtroom.

Even when an alleged contempt was not "a direct insult to the court or the judge," but consisted of vigorous advocacy or dispute of the court's rulings, a judge may view the action as a "rejection of judicial authority or an interference with the judicial process." *Bloom* v. *Illinois*, 391

U.S. at 202. After a dispute with a lawyer, judges will often be "seeking retribution" rather than impartially applying the law. *Sacher* v. *United States,* 343 U.S. 1, 37 (1952) (Frankfurter, J. dissenting).

In its final report, the Special Committee on Courtroom Conduct analyzed the published cases of summary contempt from 1960 to 1972. It found that of a total of seventy-two cases where the trial judge imposed summary punishment, forty (more than sixty percent), were later reversed by an appeals court. See DISORDER IN THE COURT, pp. 233-234.

In many of these cases, the arbitrariness of the judge's action is obvious. In a case involving members of the S.D.S. in Chicago, the judge held all sixteen defendants in contempt for laughing at one of his questions ("Who is in charge of the S.D.S.?") and sentenced them to ten days in jail. The sentences were reversed on appeal. *People* v. *Tomashevsky—Appeal of Boudin,* 48 Ill. 2d 559, 273 N.E. 2d 398 (1971). In another Illinois case, the following colloquy took place:

> The Court: There will be a fine of $50 and $5 court costs.
>
> Mr. Tecza: Is there any way I can appeal this decision. It is horribly unjust.
>
> The Court: Maybe I should raise the fine. We will make the fine $85 and $5.
>
> Mr. Tecza: Fine. On what basis are you raising it?
>
> The Court: Contempt. *People* v. *Tecza,* 4 Ill. App. 2d 1058, 283 N.E. 2d 111, 113 (1972).

The need for an impartial judge to pass upon alleged contempts is also shown by the cases in which contempt

sentences are reversed or greatly reduced by a second judge reviewing the same record. In *United States* v. *Meyer*, 462 F. 2d 877 (D.C. Cir. 1972) a lawyer was held in contempt and sentenced to 30 days in jail for making disrespectful remarks to the judge. On remand before another judge, the case was dismissed since there was no obstruction of the administration of justice. 346 F. Supp. 973 (D.D.C. 1972). In the *Dellinger* case discussed above, the original trial judge had found 10 separate defendants guilty of 173 contempt specifications and sentenced them to a total of 16 years 30 months and 106 days in jail. After appeal and remand, only 4 defendants were found guilty of a total of 13 specifications and no sentence of imprisonment was imposed. *In re Dellinger*, 72 Cr. 925 (N.D. Ill. December 6, 1973) (Gignoux, J.).

An examination of the cases showing use of the summary contempt power indicates that, as Justice Black said in *Green*, " 'prosecuting judges [should never] be trial judges of the charges they prefer.' " 356 U.S. at 199. This is just as true in cases where a sentence of less than six months is imposed. In all contempt cases the need for an impartial judge is clear. As this Court said in *Bloom*: "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power." 391 U.S. at 202.

Even if a trial judge acts instantly during the trial to hold a person in contempt (with sentence to be pronounced on the spot or at the end of the trial), this does not meet the due process problem mentioned above. The judge is just as likely (if not more so) to act arbitrarily, if he must do so on the spot. As this Court said in *Sacher* v. *United*

States, 343 U.S. 1, 11 (1952), "[if] we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment." A trial judge who attempts to hear his own contempt charges cannot, in the nature of things, be the "neutral and detached" officer required by due process. *Ward* v. *Village of Monroeville,* 409 U.S. 57, 62 (1972).

The only possible justification for requiring a different rule for summary contempts during a trial is that such power is necessary to maintain order as the trial proceeds. As Justice Frankfurter said in dissent in the *Sacher* case:

> Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity dictates the departure. Necessity must bound its limits. 343 U.S. at 36.

The necessity for summary contempt will be examined in the following section.

C. *The Summary Contempt Power Is Not Necessary to Maintain Order in the Court.*

In reaching its conclusion that the summary contempt power should be done away with, *Amicus* has not ignored the justifications that have been offered for it. The most important of these is that trial judges require such authority to maintain order in the court. Everyone recognizes the importance of a tranquil courtroom to assure the proper administration of justice, but summary power is not necessary to achieve this end. As Justice Frankfurter said, dissenting in *Sacher*:

> [The] administration of justice and courts as its instruments are vindicated, and lawyers who might be tempted to try similar tactics are amply deterred, by the assurance that punishment will be certain and severe regardless of the tribunal that imposes it. 343 U.S. at 37.

This Court has afforded trial judges ample power to deal with contemptuous behavior. As far as defendants are concerned, *Illinois* v. *Allen*, 397 U.S. 337 (1970) has granted trial judges a variety of weapons to meet misconduct. A trial judge can act with escalating steps against a defendant —by warning, removal, binding and gagging, or a citation for contempt. A defendant who has been cited knows that after trial he will be subject to a hearing and possible conviction and punishment, which should be sufficient to deter him from wayward action and to enable a judge to control his courtroom. Whatever additional "flexibility" the summary contempt power may provide is outweighed by the significant objections to it.

To the argument that immediate action is necessary to deter others from attempting similar conduct which might abort the trial, the prompt citation of a defendant or other misbehaving person for contempt is "immediate action." The threat of a later criminal trial, with the possibility of a conviction and severe penalties, is a sufficient deterrent against further disobedience within the court.

As far as lawyers are concerned, the same considerations apply. A lawyer cited for contempt faces not only the possibility of subsequent trial and conviction, but the likelihood of professional discipline as well, in the form of censure, suspension or disbarment. Some judges have

found it expedient to impose civil contempt sanctions (not to exceed overnight incarceration) during the trial to keep proceedings moving. See DISORDER IN THE COURT, 102-105, 158-159. In extreme cases, the power to remove a lawyer from a case has been exercised, *Laughlin* v. *Eicher*, 145 F. 2d 700 (D.C. Cir. 1944). In view of the limited amount of lawyer misconduct found by the Special Committee, those sanctions should be more than enough to deter misconduct by a lawyer. See DISORDER IN THE COURT, 131-132.

It is often said that the summary contempt power is needed for swift imposition of penalties. If a second contempt hearing before another judge is required, a long period may elapse. In addition, the second hearing may have to be long and complicated, thus adding to the delay in reaching a final decision. This is true, but this alone does not justify the extraordinary power to punish summarily. All criminal trials involve some delay, and the delay incident to a full contempt hearing is no more dangerous to the administration of justice than the delays incident to the procedural steps required by the Bill of Rights. Procedural safeguards in the legal process always make a criminal trial more complicated and costly than arbitrary arrest and punishment would be. As Justice Black said in the *Green* case:

> It is undoubtedly true that a judge can dispose of charges of criminal contempt faster and cheaper than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitu-

tion and Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy. 356 U.S. at 216.

It is also important to lay to rest the suggestion that a later hearing is unnecessary because the trial judge "has already witnessed directly" the events leading to the contempt citation. This point has been met very well by an analysis in the *Wisconsin Law Review*:

> The existence of eyewitness testimony, even if uncontroverted, has never been considered grounds for abandonment of due process of law. If due process is to mean anything at all, it must mean that guilt may not be presumed, but must be proven. To hold otherwise is to say that when guilt is certain, proof is superfluous. But a legal system which operates according to such tautologies plants the very seeds of despotism, which due process of law seeks to destroy. Note, "Criminal Law—Contempt—Conduct of Attorney During Course of Trial," 1971 Wisc. L. Rev. 329, 347.

Furthermore, since it is clear that a judge can often become personally embroiled or that personal stings may have left their marks, one can no longer assume that the trial judge has dispassionately and clearly viewed what occurred at the trial. Once it is recognized that due process requires an unbiased judge to determine guilt and punishment, the argument that it is "unnecessary" to have a separate hearing loses its force.

A further argument in favor of summary contempt is that appellate review may cure any defect in the summary proceeding. But there are serious shortcomings in appellate review. The appellate court reviewing a summary contempt hearing can decide only on the basis of the original record. If there is a claim of bias or personal embroilment, a defendant should have the right to offer supporting evidence to show that he was not guilty of obstructing the trial. This can be done in a separate due process hearing before another judge but not on appellate review.

Any attempt to abolish the summary contempt power will be met with the claim that it is necessary to maintain respect for and discipline in the courts. The same argument was made when restrictions were placed on the ability of courts to punish printed criticism of court action or to punish conduct outside the courtroom by a term longer than six months. These claims were not justified in the earlier cases, and we do not think they are justified here. As this Court said in *Bloom* v. *Illinois,* 391 U.S. at 208, "Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries."

It is interesting to note that many European countries do not permit a trial judge to impose sentences as long as six months for contempt. They generally grant a judge power to remove any person creating disorder in the court. If the person forcibly resists an order to leave the court, greater penalties are possible. See DISORDER IN THE COURT, 238, n. 70.

Courts and legislatures have come to recognize the abuse of summary contempt power. As noted above, the State of Alaska has eliminated summary contempt by judicial decision. In 1971 the State of Connecticut passed a law requiring a different judge to pass on all contempt charges. Connecticut Public Act No. 779 (1971). Kentucky itself (in Kentucky Rev. Stat. 432.260) placed a limit of 30 hours imprisonment for contempt if a judge imposes sentence without a jury. However, the court below held that limitation to be unconstitutional since it interfered with the administration of justice! By the same token, every right in the Bill of Rights "materially interferes with the administration of justice" since it makes punishment more difficult.

As a judge of the Pennsylvania Supreme Court has written:

> Why should we allow a judge or (Justice) to have a special privilege when the judicial function is allegedly obstructed? There is constitutional silence concerning any special judicial privilege which permits the judicial branch to deprive a person of constitutional rights because a member of the judicial branch is involved. Punishment for contempt of court without constitutional protections *that exist for all other crimes* is nothing more than the exercise of raw judicial power. It is not the exercise of constitutional judicial authority. . . . *The obstruction of justice,* in any way, at any time, by any person, *is a serious offense.* We have, however, other workable procedures to prevent disruptions in the courtroom. We do not need a special privilege for judges which dispenses with constitutional safeguards. *Commonwealth* v. *Patterson,* —— Pa. ——, 308 A. 2d 90, 95 (1973) (Manderino, J. dissenting).

The time has come to eliminate this most serious and unnecessary anomaly in the administration of justice.

POINT II

The trial judge below was required to refer the contempt proceedings to another judge for a full due process hearing.

Even if this Court does not find that summary contempt per se violates the due process clause, it must still reverse the judgment below. Under existing precedents of the Court, there were so many violations of proper procedures that the conviction cannot stand. These include the fact that (1) the judge was personally embroiled with the alleged contemnor; (2) the four-and-a-half year sentence originally imposed was a recognition of the seriousness of the offense which, therefore, required a jury trial; and (3) a proper hearing was not afforded the petitioner.

A. *The Trial Judge Could Not Impartially Sit in Judgment of the Contempt Charges Against Petitioner.*

As noted above, *Offutt* v. *United States,* 348 U.S. 11 (1954) established the proposition that a judge who becomes personally embroiled with the alleged contemnor cannot sit in judgment of the contempt charges. *Mayberry* went further and said that if a judge has been the victim of a personal attack, he must refer any contempt charges to another judge. If there is evidence of bias, *Johnson* v. *Mississippi,* 403 U.S. 212 (1971) requires that the matter be heard by a second judge.

In the instant case, there is overwhelming evidence of the judge's personal animus against the petitioner. Peti-

tioner in his main brief cites numerous instances in which the judge cast aspersions on his character or motives. During the voir dire, the trial judge interrupted the petitioner's examination of a prospective juror and stated that he was going to take it over, saying to the petitioner: "I think you're putting on a show. That's my opinion" (Tr. 348). During a discussion in chambers about wrangling between attorneys, he stated in reference to the petitioner: " . . . you all were talking and I can't blame the guy too much for that, but on the other hand, he is getting away from the questions and knowing him, if you give him an inch, he'll take a mile. I might as well sit on him right now" (Tr. 546). In another interchange the trial judge again insisted on indulging in personalities and baiting the petitioner:

> Mr. Taylor: Does Your Honor understand that my purpose is to defend my case?
>
> The Court: I think that's probably what you're here for, I'm not sure (Tr. 1364).

And in still another interchange when the petitioner attempted to explain his basis for making an objection:

> Mr. Taylor: The objection is that he uses the word "also" as inferring that he's got these great confessions.
>
> The Court: Don't go through all those configurations and put on an act (Tr. 1860).

At a later point, the following exchange occurred:

> Mr. Taylor: Thank you. Now, may I say, additionally, I have serious doubts as to the legal correctness of the order and since we have, I have, I don't know,

five months of my life wrapped up in this case, and maybe more than that—

The Court: (interrupting) Before it's over, you might have a lot more than that (Tr. 1957).

Just before the trial judge below passed sentence he made the following comments about the petitioner:

The Court: I've for two weeks sit here and listen to you (sic). Now, you're going to listen to me. Stand right here, sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years in this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason.

It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean that it's based upon planned confusion.

Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule—

Mr. Taylor: (Interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself (sic). 494 S.W. 2d at 742.

It should be noted that these comments were very similar to those made by the trial judge in *Offutt* which, according to this Court, showed "personal embroilment" on his part. 348 U.S. at 16, 17.

However one views the frequent encounters between the parties and however one attributes blame for them, there was clearly an adversary posture between petitioner and the trial judge throughout the proceedings. There was nothing subtle, hidden or uncertain about the judge's animosity toward petitioner. In addition to the exchanges quoted above and in petitioner's brief, the judge originally sentenced petitioner to 54 months in jail for nine counts of contempt. On two counts the sentence was one year which was later amended to six months each. The trial judge also suspended petitioner from practicing in his court ever again. (This order was reversed by the Kentucky Court of Appeals.) It would be difficult to find more blatant examples or more concrete evidence of personal involvement by a judge than is found in the instant case.

The Court of Appeals said in *United States* v. *Meyer*, 462 F.2d 827, 841 (D.C. Cir. 1972) that "when the judge adopts an adversary posture with respect to the alleged contemnor," referral to an impartial judge is necessary. That situation is clearly present here. For that reason alone the conviction below must be reversed.

B. *Petitioner Was Entitled to a Jury Trial Because of the Seriousness of the Offense With Which He Was Charged.*

There are only two ways in which to view the fifty-four month sentence originally imposed on the petitioner by the trial judge. It could have been a reflection of the personal animosity of the trial judge toward the petitioner, in which case referral to another judge was required by *Offutt* and *Mayberry*. Or, assuming for the moment that the sentence was the result of sober consideration and dispassionate judicial reasoning, it was a reflection of the seriousness of the offense with which petitioner was charged. In the latter case, the charges should have been heard by a jury.

This Court held in *Duncan* v. *Louisiana,* 391 U.S. 145 (1968) that trial by jury was fundamental to the American scheme of justice and that the Sixth Amendment guarantee of jury trial was applicable to the states through the Fourteenth Amendment. " . . . a general grant of jury trial for serious offenses is a fundamental right." 391 U.S. at 157-158. The Court held that trial of simple battery under state law required a jury trial since the maximum penalty possible was two years, even though the defendant in that case had only been sentenced to 60 days in jail. "The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments' . . . of the crime in question." 391 U.S. at 160. Thus if the maximum penalty for an offense exceeds six months, a jury trial is necessary.

Where contempt is involved and no maximum penalty is fixed by statute, different calculations apply. This Court held in *Frank* v. *United States,* 395 U.S. 147, 149 (1969):

> In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed,

is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense. See *Duncan* v. *Louisiana*, ... But a person may be found in contempt of court for a great many different types of offenses, ranging from disrespect for the court to acts otherwise criminal. Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion; it has not categorized contempts "serious" or "petty." 18 U.S.C. §§ 401, 402. Accordingly, this Court has held that in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense.

In *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966) this Court approved a six month sentence for criminal contempt imposed by a federal court of appeals for violation of its order. But this Court's holding in *Frank* and in *Cheff* v. *Schnackenberg* cannot mean that a serious contempt may be tried and punished by a judge alone without a jury if eventually, some appellate court will reduce the sentence to six months. This Court emphasized in *Frank* that there must be "objective indications of the seriousness with which society regards an offense." 395 U.S. at 148. These "objective indications" cannot be disregarded or overcome by an appellate court retroactively imposing a six month sentence.

In *Bloom* v. *Illinois*, 391 U.S. 194 (1968) the defendant was sentenced to 24 months in jail for criminal contempt by

a judge sitting without a jury. It was clear that the Illinois courts thought that the offense involved was a serious one. However, this Court did not attempt to undermine the right to a jury trial by retroactively reducing the two year sentence to six months. If appellate courts are permitted to deprive a defendant of the right to jury trial by reducing every contempt sentence to six months, this Court's holding in *Bloom* that serious contempts must be tried by a jury becomes meaningless. It can easily be evaded in every case through the device used by the Kentucky court below.

The correct rule must be that some contempts are so serious that jury trial is required under the Fourteenth Amendment. The seriousness of the offense is not determined only by what an appellate court later decides about the sentence. There is nothing in the opinions below that indicated that either the trial judge or the Kentucky Court of Appeals thought that petitioner's actions in court were not serious offenses. Indeed, strong condemnation of petitioner's deeds pervade the opinions below. The Kentucky Court of Appeals said:

> We have examined the entire record of the Tinsley trial, and it becomes immediately apparent that even before the trial had "gotten off the ground, so to speak," Taylor had embarked upon a plan or program designed to disrupt the trial and by any means possible cause the trial court to commit trial errors which might form the basis of an appeal. His actions were such as to clearly illustrate that they were deliberate, delaying, or planned disruptive tactics which did in fact create such an atmosphere in the court that he, if permitted to continue, would have appeared to be the star performer in the center ring of a three-ring circus. He

constantly harassed the court by innumerable objections, statements, and requests for conferences in chambers, and, in truth, the record indicates that a great percentage of the trial time was consumed by the court and counsel attending speeches made by Taylor in the court's chambers. 494 S.W.2d at 740.

The seriousness of the offense, for the purpose of determining the right to a jury trial, must be determined by objective criteria before or during the trial. In *United States* v. *Seale*, 461 F.2d 345, 356 (7th Cir. 1972) the Seventh Circuit held that on remand of the contempt charges in that case, "If the judge to whom this case is referred for trial decides that the outside limit of a sentence for Seale should be six months maximum including cumulation, that would obviate the necessity of having a jury on the remand." In this way the Court of Appeals eliminated the uncertainty whether a jury was necessary or not.

In cases where contempt citations are imposed during the trial, the penalty actually imposed by the trial court is the most reliable, objective criterion to determine the right to a jury trial. Certainly the sentence by, and the comments of, the trial judge below were a forceful declaration of how serious the offense was considered. It can well be argued that any criminal contempt involving courtroom misconduct is serious enough to warrant jury trial. If the offense has been regarded as so serious that it justifies immediate summary action, it is serious enough to trigger the jury trial requirement of the Fourteenth Amendment.

C. *A Proper Hearing Was Not Afforded the Petitioner Below.*

Many decisions of this Court have emphasized the need for a hearing before any punishment may be inflicted or any rights or benefit lost. "[W]e have stated time and time again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'" *Groppi* v. *Leslie,* 404 U.S. 496, 502 (1972). In *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 313 (1950), the Court stated:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In the instant case no appropriate hearing was afforded the petitioner before the trial judge held him in contempt and sentenced him to 54 months in jail. During the trial the judge informed petitioner nine separate times that he was in contempt. On each count either the judge would not let him respond for the record or a discussion of a substantive issue would ensue. After the verdict was rendered in the trial, the judge called the petitioner before the bar and told him that he had put on "the worst display I've ever seen an attorney" engage in. He made other disparaging remarks and then would not permit petitioner to respond:

> The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself (sic).

Mr. Taylor: I would respond to you, sir—

The Court: (Interrupting) You're not responding to me on anything.

Mr. Taylor: (Interrupting) Oh yes, I will.

The Court: Yes, you're not, either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One—

Mr. Taylor: (Interrupting) Unless you intend to gag me—

The Court: I'll do that—

Mr. Taylor: (Interposing) My lawyers will respond to you—

The Court: (Interposing) I'll do that, sir.

Mr. Taylor: My lawyers will respond to you, sir.

The Court: You be quiet, or you'll—there will be some more contempts—

Mr. Taylor: (Interrupting) No, you heard what I said.

The Court: I have you on nine counts. First Count, 30 days in jail; Second Count, 60 days in jail; Third Count, 90 days in jail; Fourth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive. Take him away.

Mr. Taylor: We will answer you in court.

The Court: I'd be glad to see you (Appendix, pp. 58-59).

With respect to the substantive charges themselves, petitioner in his main brief has pointed out that there was no proper notice of the individual charges against petitioner and no meaningful opportunity to respond to them. A reading of the record bears out this contention.

But even if the contempt citations were properly imposed, the lack of opportunity at the end of the trial to offer any meaningful response violated due process. Despite the fact that the trial judge may have viewed the conduct giving rise to the charges, there are many matters which the petitioner could have offered in his defense.

(1) He could have tried to show that the conduct did not "block the judge in the performance of his judicial duty," *In re McConnell*, 370 U.S. 230, 236 (1962).

(2) He could have tried to show that there was no intent to obstruct the administration of justice. See, e.g., *United States* v. *Seale*, 461 F.2d 345, 365 (7th Cir. 1972).

(3) He could have tried to show that the judge had confused "offense to [his] sensibilities with obstruction to the administration of justice." *Brown* v. *United States*, 356 U.S. 148, 153 (1958).

(4) He could have tried to persuade the judge not to impose or to reduce the sentence through his exercise of the right of allocution. ". . . the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi* v. *Leslie*, 404 U.S. 496, 504 (1972).

A recent Court of Appeals decision has expressly upheld the right of an alleged contemnor to allocution before sentencing. In *Weiss* v. *Burr*, 484 F.2d 973, 984 (9th Cir. 1973), the Court noted:

> The last and most difficult question is whether the trial court's contempt procedures in respect to the three remaining citations infringed Weiss's constitutional right to speak in defense and mitigation before being sentenced. *See Groppi* v. *Leslie*, supra, 404 U.S. at 501. We hold that they did. Due process requires that contemnors such as Weiss, who are not cited *and* simultaneously punished for the purpose of either restoring courtroom decorum or protecting the safety of court officials are entitled to an opportunity for allocution.

The Second Circuit has more recently held that the right of allocution is not enough in a contempt case. There must be a more meaningful opportunity to be heard in mitigation of the offense. In *United States* v. *Wilson and Bryan*, —— F.2d —— (2d Cir. November 28, 1973) the court reversed a summary contempt citation imposed on a witness after an orderly refusal to answer certain questions. To the objection that an adequate hearing was given the alleged contemnors, the court said:

> Nor is the bare "opportunity to be heard" dispositive here since the "hearing" was confined to the matter of sentence. If, however, counsel had been given "a reasonable time for the preparation of the defense" (Fed. R. Crim. P. 42 [b]); she might have marshalled and presented facts in mitigation of the charge. Significantly, the record reveals the possibility of a psychiatric defense, at least for Wilson. Some of Wilson's

psychological problems, disclosed by a court-ordered study, were explored at an abortive sentencing hearing on his guilty plea, preceding the refusal to testify. With respect to that conviction, Judge Lasker concluded: "I do not believe that in this complicated case I have sufficient information before me to permit me justly to proceed to sentence with Mr. Wilson." Shortly thereafter, nonetheless, he proceeded to sentence him for contempt. With additional time to prepare a defense, counsel for Wilson might have enlarged on the issue of appellant's mental health, and perhaps shown a relationship between any psychological difficulties and the refusal to serve as a witness. Finally, because of the posture of the case, the record is silent on other facts which may well exist in defense or mitigation of the charge against both appellants, and which could be properly developed at a plenary hearing.

Speaking more generally, the Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice has stated:

F.4 Notice of charges and opportunity to be heard

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

Commentary

Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte Terry,* 128 U.S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness and is

likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course. Nothing in this standard, however, implies that a plenary trial of contempt charges is required. Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice. *The Judge's Role in Dealing with Trial Disruption* 20 (1971).

Since no meaningful hearing was afforded the petitioner, the judgment below must be reversed.

CONCLUSION

For the foregoing reasons, the Association respectfully submits that the judgment below should be reversed.

Respectfully submitted,

BURKE MARSHALL
Yale University
Law School
New Haven, Connecticut

LEON FRIEDMAN
Committee for Public Justice
22 East 40th Street
New York, N. Y. 10016

NORMAN DORSEN
NYU Law School
40 Washington Square, South
New York, N. Y. 10012

Attorneys for the Association of the Bar of the City of New York

Dated: New York, New York
January 17, 1974

In the

Supreme Court of the United States

No. 72-428

Dennis T. Tanner III,

Petitioner,

v.

John P. Hayes, Judge, Jefferson Circuit Court,

Respondent.

BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

James Lesson, President
Arthur Kinoy, Vice-President
National Lawyers Guild
23 Cornelia Street
New York, New York 10014

Attorneys for
National Lawyers Guild

Of Counsel:

Victor Rabinowitz
Rabinowitz, Boudin
& Standard
30 East 42nd Street
New York, N.Y. 10017

David Rockwell,
693 Massachusetts Avenue
Cambridge, Mass. 02139

INDEX

	Page
Statement	1
Point I - Summary Punishment of the Petitioner Without A Trial By Jury Is, In The Circumstances Of This Case, Improper	3
Point II- The Right of Allocution Was Improperly Denied to the Petitioner	18
Conclusion	19

TABLE OF CASES

Bloom v. Illinois, 391 U.S. 194 (1968) 4, 9

Cheff v. Schnackenberg, 384 U.S. 373 (1966). 3-4, 5, 13

Duncan v. Louisiana, 391 U.S. 145 (1970) ... 6, 13

Frank v. United States, 395 U.S. 147 (1969). 4, 5-6, 13,14,15

Green v. United States, 356 U.S. 165 (1957). 9, 12

Holt v. Virginia, 381 U.S. 131 (1965) 3, 4

Illinois v. Allen, 397 U.S. 337 (1970) 4

In re Dellinger, 461 F.2d 389 (7th Cir. 1972) 4, 11

In re Dellinger, 72 CR 925, N.D. Ill., Dec. 6, 1973 11

Johnson v. Mississippi, 403 U.S. 212 (1971). 4

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 4, 10, 16

Offutt v. United States, 348 U.S. 11 (1954). 3,4, 10

Page

Sacher v. United States, 343 U.S. 1 (1952) 3, 4, 9, 10

Sacher v. Bar Association, 347 U.S. 388 (1954) 7

Schiffer v. United States, 351 F.2d 91 (6th Cir. 1965) 4

Ungar v. Sarafite, 376 U.S. 575 (1964) ... 3, 4, 16

United States v. Barnett, 376 U.S. 681 (1964) 3

United States v. Seale, 461 F.2d 345 (7th Cir. 1972) 4

Weiss v. Burr, 384 F.2d 973 (9th Cir. 1973) 4, 19

Other Authorities:

Dorsen and Friedman: Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct, Pantheon Press (1974) 5, 10

In The

SUPREME COURT OF THE UNITED STATES

No. 73-473

DANIEL T. TAYLOR III,

Petitioner,

v.

JOHN P. HAYES, Judge,
Jefferson Circuit Court,

Respondent.

BRIEF OF THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE*

STATEMENT

The National Lawyers Guild is an association of lawyers, law students and legal workers which seeks to make available the talents and skills of its members to those who are struggling

---

* Letters from the respective parties consenting to the submission of this amicus have been filed with the Clerk of this Court.

against oppression and who seek to defend their own civil liberties and the liberties and rights of others under our Constitution. Many of its members are trial lawyers or are otherwise engaged in litigation, both criminal and civil, which has significant social, economic or political overtones and which is concerned with the basic constitutional liberties of their clients and of the people of the United States.

We are, therefore, particularly interested in cases like the instant case. The actions of the Kentucky court constitute a serious attack on the historical right - even duty - of an attorney to represent his client with vigor, skill and devotion; even more important the decisions against petitioner do a profound disservice to his clients and countless others similarly situated who will in the future require the aid of fearless and courageous advocates who may on occasion be required to confront temperamental, biased or even corrupt judges.

The National Lawyers Guild has frequently submitted amicus briefs in similar cases where issues presented to the court are of broad public importance.

POINT I

SUMMARY PUNISHMENT OF THE PETITIONER WITHOUT A TRIAL BY JURY IS, IN THE CIRCUMSTANCES OF THIS CASE, IMPROPER.

This Court has, in a number of cases in the past few years, had occasion to discuss some of the procedural and substantive problems arising out of punishment for contempt of court. These cases considered the propriety of summary punishment, the right of trial by jury, the right to a trial before a judge other than the one originally offended by the alleged contempt and a series of related problems. See, for example, Sacher v. United States, 343 U.S. 1 (1952); Offutt v. United States, 348 U.S. 11 (1954); United States v. Barnett, 376 U.S. 681 (1964); Ungar v. Sarafite, 376 U.S. 575 (1964); Holt v. Virginia, 381 U.S. 131 (1965); Cheff v. Schnacken-

berg, 384 U.S. 373 (1966); Bloom v. Illinois, 391 U.S. 194 (1968); Frank v. United States, 395 U.S. 147 (1969); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Johnson v. Mississippi, 403 U.S. 212 (1971), and see Illinois v. Allen, 397 U.S. 337 (1970). The lower federal courts have also had frequent occasion to consider these and related problems. Typical cases are Schiffer v. United States, 351 F.2d 91 (6th Cir. 1965); United States v. Seale, 461 F.2d 345 (7th Cir. 1972); In re Dellinger, 461 F.2d 389 (7th Cir. 1972); Weiss v. Burr, 384 F.2d 973 (9th Cir. 1973).

The Sacher, Offutt, Holt, Bloom, Mayberry,[1/] Dellinger, Schiffer and Weiss cases involve contempt proceedings against lawyers and, we believe, raise special problems for reasons which will be set forth below.

1/ The petitioner in Mayberry was a layman who was a pro se defendant and therefore was performing the role of a lawyer; the petitioner in Ungar, conversely, was a lawyer whose alleged contempt was committed while a witness.

Aside from the decided cases there has been a great deal of commentary on the subject. The most comprehensive and most recent has been Dorsen and Friedman: Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct, Pantheon Press (1974) (hereinafter referred to as the "Bar Association Report"). That report not only contains extensive commentary on the problem but further contains valuable bibliographical material.

It is not easy to distil from all of this material a set of rules which will provide a reliable guide for future cases, but we suggest that some principles emerge which should be considered by this Court and which would call for reversal in this case.

First and most important we suggest that cases involving lawyers, in which the alleged contempt arises out of courtroom conduct ought to be governed by rules different from that in cases like Cheff v. Schnackenberg, supra, and Frank

v. United States, supra. This is not because the lawyer should enjoy a privileged status. On the contrary, we recognize that lawyers, in this context, have a much greater responsibility to the court and to the public than has a layman. Our constitutional system cannot function without lawyers with the courage to challenge injustice "without fear or favor"; simultaneously, a lawyer should not be permitted to obstruct the judicial process. It follows that every alleged contempt by a lawyer should be treated as a "serious" case, (see Duncan v. Louisiana, 391 U.S. 145, 158 (1970)) for it is serious, and critical to the maintenance of the Constitution.

There are two considerations to be kept in mind in this connection:

(1) The "collateral" consequences to a lawyer of a contempt citation cannot be measured by the length of his prison term nor can it reasonably be compared to the collateral consequences visited upon a layman in the usual case. At stake may be the lawyer's license to continue

to practice law (cf., Sacher v. Bar Association, 347 U.S. 388 (1954); as a member of a profession charged with the most confidential matters, his standing in the community will be seriously affected; his absence from his office, even for one or two months, and his consequent inability to carry out continuing obligations to clients may be fatal to his practice and may have serious consequence for those clients.

(2) Even more important is the effect of such a contempt citation on other members of the bar and especially on those whose practice, like that of petitioner, and like that of many members of the National Lawyers Guild, includes criminal trials raising substantial political, racial or social issues. It is hard to overestimate the effect on the bar of the contempt citation of Harry Sacher. It is no exaggeration to say that for a decade after his convictions, conscientious lawyers who were involved in criminal litigation on behalf of alleged subversives, blacks or other unpopular groups were

profoundly affected by the knowledge that a trial lawyer could be summarily sentenced to six months in jail by the trial judge in a hotly contested criminal case. Similarly, an affirmance of the conviction of petitioner here will be recalled by other lawyers compelled by their duty to their client, to confront an irascible and hostile judge. The ultimate loser will not be the lawyers, but their clients. The consequences of the summary conviction of a lawyer for contempt are thus of much more importance to the people of the United States generally than they are to the members of the bar directly affected.

It is for these reasons that we urge that special consideration should be given to contempt cases involving lawyers and particularly

lawyers involved in litigation.[2/]

In view of the foregoing, we urge:

1. There should never be summary proceedings to hold a lawyer for contempt committed in the course of a trial. The entire concept of summary contempt is of doubtful validity in view of the safeguards of our Constitution. Green v. United States, 356 U.S. 165, 193 (1957) (Black, J. dissenting), and indeed historical research will fail to disclose significant precedent for such proceeding even in the period prior to the adoption of our Constitution in either the United States or England. Green v. United States, supra, 202 et seq. The Sacher case sanctioned such

---

2/ We note the difference between this case and a case like Bloom v. Illinois, supra. In the Bloom case the alleged contempt consisted of the filing for probate of a forged will. This Court reversed the conviction on the ground that the petitioner there was entitled to a jury trial and that decision, of course, is quite consistent with other holdings of the court. There is however no danger that the punishment visited upon an attorney who commits such a fraud on the court would have an in terrorem effect on other members of the bar.

summary proceedings against a lawyer in very limited circumstances and we suggest that this Court has never been comfortable with the procedure there approved. Indeed, since the Sacher case, this Court has never repeated its holding, and has found reasons for not applying it.[3/] See, for example, Mayberry v. Pennsylvania, supra. We submit that the rule of Sacher ought to be reconsidered by the court and that the procedure sanctioned therein ought not to be permitted in any circumstances.

There are many reasons for this, and some of them are described in detail in the Bar Association Report, supra at pages 232-238. It is there noted (p. 233) that between 1960 and 1972 there are 39 reported cases in which a trial judge imposed summary punishment on a lawyer for contempt. Twenty-two of those cases were reversed on appeal! Of seven such cases in the federal

---

3/ It may well be that the retreat from the Sacher rule started only two years after its promulgation, in Offutt v. United States, supra.

courts, five were reversed. Such a high ratio of reversal to affirmance should be a clear warning that something is seriously wrong, and the trial courts should not be encouraged to continue on a path so destructive of time and energy and so inconsistent with the efficient administration of justice.

We do not, of course, overlook the problem of courtroom disorder. It should be noted, in passing, that the frequency of serious courtroom disorder provoked by a lawyer is much exaggerated and most of the highly publicized cases turn out to be, on analysis, not well founded. 4/

4/ A recent case in point has been the highly publicized conduct of William Kunstler in the recent Anti-Riot Act case in Chicago. He was sentenced by Judge Hoffman to four years and 13 days on 24 specifications. The Court of Appeals dismissed 11 of the specifications and part of another. In re Dellinger, supra at 400. The others were remanded to the District Court for trial before another judge. At that trial, Mr. Kunstler was acquitted on all but two counts, and even on those received no sentence. In re Dellinger, 72 CR 925, N.D. Ill., Dec. 6, 1973.

And for the Sacher contempt, another highly publicized case, see the dissenting opinion of Mr. Justice Franfurter at 343 U.S. 23.

Such courtroom disorder as may occur can be handled in other ways. Lawyers who provoke disorder may be subjected to criminal contempt charges to be tried later by a jury; they may be punished criminally for obstruction of justice; they may be subjected to disbarment proceedings; they may be subjected to civil contempt and fined therefor. It may be that in some few cases such sanctions are not enough to keep order but when that is the case, it may be that such instances are not "sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value." Green v. United States, 356 U.S. at 216 (Black, J. dissenting).

2. There should never be punishment of a lawyer for courtroom contempt without a jury trial.

The history of jury trials in contempt cases calls for some comment. It has, for some years, been the rule that the right to a jury trial in any criminal case depends on the "serious-

ness" of the offense and that to determine seriousness an important, and perhaps decisive element, is the sentence which the legislature has authorized for the offense. If the maximum authorized sentence is over six months, a jury trial is required. Duncan v. Louisiana, 391 U.S. 145.

This rule is not immediately applicable to a contempt case since there is usually no maximum penalty provided by the legislature. One would have thought, as an original proposition, that if a jury trial is required whenever the judge is permitted to impose a sentence of over six months, a fortiori a jury trial would be required where there is no limit at all to the length of sentence the judge may impose, but this Court held otherwise in Cheff v. Schnackenberg, supra; Frank v. United States, supra.

The result is an analomous one. The question of jury trial vel non comes at the beginning of a proceeding; sentence comes at the end. Yet a court confronted with a contempt situation must decide whether to grant a jury

trial on the basis of what it assumes the sentence will be. In Frank v. United States, supra, the Court sought to resolve this logical paradox by imposing a limit on the power of the sentencing court, i.e., by holding that where a jury trial has not been held, the court may not impose a sentence of more than six months. This seems to turn the matter on its head. Usually a judge determines sentence on the basis of the evidence adduced at the trial; here a judge must, before trial, decide whether his sentence will be more or less than six months in order to decide whether to grant a jury trial.

We believe that the argument in favor of a jury trial in all contempt cases is a compelling one, but the argument for requiring a jury trial in cases involving a lawyer is irrefutable. We discuss the "embroilment" problem below, but note here only that the likelihood of extreme hostility on the part of the judge (and hence the need for the protection granted by a jury) is much greater when the alleged contemnor is a

lawyer than when he is a layman. An insult from a layman can be regarded as showing disrespect and discourtesy; an insult from a lawyer cannot help but be regarded as an attack on the judiciary as an institution. Even when another judge is assigned to hear the case he is likely to be vicariously offended by the contemptuous conduct of a lawyer even though he may not be the butt of that contempt.

3. A trial of a lawyer for contempt should always be assigned to a judge other than the one in whose court the contempt allegedly occurred.

If a trial by jury is directed as hereinabove suggested, it necessarily follows that a new judge must be assigned to the case; it would be impossible to call upon a jury to make findings of fact in a situation in which the presiding judge was himself personally familiar with the facts. But even if this Court decides that some cases may be tried without a jury, in accordance with the rule of Frank v. United

States, supra, we submit that in any event the trial should never be before the same judge.

The "embroilment problem" has troubled the courts in all of these cases. In most of the cases, the court has attempted to adopt an objective test of embroilment. What the court has considered in each case was not whether the judge was in fact actually insulted to the point where he was incapable of rendering judgment impartially, but whether the nature of the contempt was such that a normal judge would have been so affected. Thus, in Ungar v. Sarafite, supra, this Court looked at the words in the record and came to the conclusion, without any information as to the character of Judge Sarafite, that a hypothetical judge subjected to this kind of treatment would not have been so affected that he could not try the case fairly. In Mayberry v. Pennsylvania, supra, on the other hand, this Court looked at the language in the record and came to the conclusion that the same hypothetical judge would be so insulted that he could not try

a case without bias. No one conducted an investigation into the personality of the judge in that case.

But as has so frequently been pointed out, judges are human and like other humans, they vary greatly in their reactions to offensive language. Some judges are irascible, hot-tempered and sensitive and are easily angered; other judges are calm, phlegmatic and insensitive; they may be totally unaffected by precisely the same conduct on the part of an alleged contemnor. It is clearly improper for this Court to make assumptions concerning the embroilment or non-embroilment of a judge in a criminal case without any evidence as to his actual feelings. And it is equally true that an appellate court could hardly take evidence on the boiling point of a trial judge.

The way out of the dilemma is clear. The offended judge ought not to sit at the trial because there is a grave danger that he will be unable to maintain the disinterestedness required

of a judge and because even if he is one of those rare individuals who can keep his balance under these circumstances, the appearance of bias cannot be avoided.

Moreover, in every contempt case, the judge is the actual complainant, and it is inconsistent with our system of justice that a complainant should sit on his own case.

In addition, of course, there is no reason at all in public policy why the judge in whose court the contempt occurred should preside over the contempt trial once we agree that a summary proceeding is improper.

POINT II

THE RIGHT OF ALLOCUTION WAS IMPROPERLY DENIED TO THE PETITIONER.

The right of allocution is a well established and ancient right in any criminal case and there is no possible justification for denying it to any defendant. Judges are all assumed to be reasonable men and reasonable men may sometime be convinced by argument. It may effect not only their finding of guilt or inno-

cence, but more frequently the sentence they impose.

It is clear that the right of allocution was denied to the petitioner in the present case. The recent law on the subject is fully discussed in Weiss v. Burr, supra, and need not be repeated here.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

THE NATIONAL LAWYERS GUILD

By James Larson
James Larson, President
Arthur Kinoy, Vice-President
23 Cornelia Street
New York, New York 10014

Of Counsel:

Victor Rabinowitz
Rabinowitz, Boudin
& Standard
30 East 42nd Street
New York, N.Y. 10017

David Rockwell
698 Massachusetts Avenue
Cambridge, Mass. 02139

Dated: New York, N.Y.
January 16, 1974

JAN 24 1974

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-473

DANIEL T. TAYLOR, III,

Petitioner,

—v.—

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorney for Amicus

January 1974

INDEX

	PAGE
Interest of *Amicus*	2
Argument:	
Petitioner's conviction must be reversed since he was not afforded a proper due process hearing on the contempt charges	2
Conclusion	8

TABLE OF CASES

	PAGE
Brown v. United States, 356 U.S. 148 (1958)	6
Fuentes v. Shevin, 407 U.S. 67 (1972)	4
Goldberg v. Kelly, 397 U.S. 254 (1970)	5
Groppi v. Leslie, 404 U.S. 496 (1972)	5, 6
In Re McConnell, 370 U.S. 230 (1962)	5
Morrissey v. Brewer, 400 U.S. 275 (1972)	5
United States v. Meyer, 346 F. Supp. 973 (D.D.C. 1972)	5
United States v. Seale, 461 F.2d 345 (7th Cir. 1972)	5
United States v. Wilson, F.2d (2nd Cir. Nov. 28, 1973)	6
Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-473

DANIEL T. TAYLOR, III,

Petitioner,

—v.—

JOHN P. HAYES, JUDGE, JEFFERSON CIRCUIT COURT, CRIMINAL BRANCH, SECOND DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

The American Civil Liberties Union files this brief pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Both Petitioner and Respondent have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of this Court.

INTEREST OF *AMICUS*

The American Civil Liberties Union is a nationwide nonpartisan organization of over 250,000 members devoted solely to the protection of the liberties safeguarded by the Bill of Rights. During its fifty-three year existence the ACLU has consistently asserted that imprisonment for any offense is constitutionally invalid when imposed without due process of law. We believe that even in summary contempt proceedings, due process of law is constitutionally indispensible. Because we believe that petitioner in this case was denied the measure of due process required in summary contempt convictions, we file this brief to urge reversal of his conviction.

ARGUMENT

PETITIONER'S CONVICTION MUST BE REVERSED SINCE HE WAS NOT AFFORDED A PROPER DUE PROCESS HEARING ON THE CONTEMPT CHARGES

Petitioner's brief describes how the various contempt citations were imposed on him. The first count was subsequently withdrawn by the trial judge. The second count arose after petitioner tried to submit certain evidence concerning his client's escape from custody which the court had ruled inadmissible. Petitioner was cited for "completely ignoring the Court's ruling" (Tr. 1081). Petitioner responded for the record but did so primarily on the substantive question of the admissibility of the evidence.

On Count 3, the trial judge simply said: "The Court is holding Mr. Taylor in contempt for the second time during the trial for smarting off to the Court in open court. That's all I've got to say" (Tr. 1356). Petitioner responded for the record and then engaged in a discussion with the judge about the manner in which he was representing his client.

On the fourth count, the court simply announced that "Mr. Taylor is in contempt of court" (Tr. 1799). No specific charge was levied against petitioner, but in his later written specification the trial judge wrote that petitioner had been "most disrespectful to the court and refused to take his seat at the counsel table as ordered." 494 S.W.2d at 740.

On the fifth count, the trial judge again announced that petitioner was in contempt (Tr. 1956). Once again the discussion about the alleged contempt was intermixed with a substantive point at the trial, in this case an order by the judge that petitioner submit an immediate list of all the witnesses he would be calling at the trial.

On Count 6, the judge held petitioner in contempt and told him he could respond at the next recess (Tr. 2016-17). However, the opportunity did not arise. On Count 7, the trial judge ordered the court reporter not to put petitioner's response in the record (Tr. 2032). The trial judge did not permit petitioner to make a response on the record on Count 8 (Tr. 2069). On Count 9, he again simply informed the petitioner that he was in contempt (Tr. 2172).

After the verdict was rendered in the trial, the judge called the petitioner before the bar and told him that he had put on "the worst display I've ever seen an attorney" engage in. He made other disparaging remarks and then would not permit petitioner to respond:

> "The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself.
>
> Mr. Taylor: I would respond to you, sir–
>
> The Court: (Interrupting) You're not responding to me on anything.

Mr. Taylor: (Interrupting) Oh yes, I will.

The Court: Yes, you're not, either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One–

Mr. Taylor: (Interrupting) Unless you intend to gag me–

The Court: I'll do that–

Mr. Taylor: (Interposing) My lawyers will respond to you–

The Court: (Interposing) I'll do that sir.

Mr. Taylor: My lawyers will respond to you, sir.

The Court: You be quiet, or you'll–there will be some more contempts–

Mr. Taylor: (Interrupting) No, you heard what I said.

The Court: I have you on nine counts. First Count, 30 days in jail; Second Count, 60 days in jail; Third Count, 90 days in jail; Fourth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

Take him away.

Mr. Taylor: We will answer you in court.

The Court: I'd be glad to see you." (Appendix, pp. 58-59).

In no significant sense could petitioner be said to have been afforded a due process hearing either during the trial when the contempt citations were handed down or afterwards when sentence was imposed. But this Court has emphasized again and again the importance of a hearing before important substantive rights are lost. "For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard . . ." *Fuentes* v. *Shevin*,

407 U.S. 67, 80 (1972). See also *Morrissey* v. *Brewer*, 400 U.S. 275 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

If a hearing is necessary when property rights are threatened, *a fortiori* it is necessary when a person's liberty is at stake. This Court has outlined the following requirements for a due process hearing in criminal cases: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense–a right to his day in court–are basic to our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948). This is as true in contempt cases as in any other criminal proceeding: " . . . we have stated time and time again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.' " *Groppi* v. *Leslie*, 404 U.S. 496, 502 (1972).

A meaningful hearing is necessary in contempt cases even though the conduct that gave rise to the charges took place within the view of the trial judge, for a trial judge must be presumed to be amenable to argument or explanation. There are many matters which might be presented in defense of a summary contempt citation or in mitigation of sentence:

(1) An accused could try to show that his behavior did not "block the judge in the performance of his judicial duty." *In re McConnell*, 370 U.S. 230, 236 (1962). Or he might try to persuade the judge that there was no actual obstruction of the administration of justice. *United States* v. *Meyer*, 346 F.Supp. 973 (D.D.C. 1972).

(2) An accused could try to show that he had no intent to obstruct the administration of justice. "The minimum requisite intent is better defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *United States* v. *Seale*, 461 F.2d 345, 368 (7th Cir. 1972).

(3) An accused might try to show that the judge confused

"offense to [his] sensibilities with obstruction to the administration of justice." *Brown* v. *United States* 346 U.S. 148, 153 (1958).

(4) An accused might try to persuade the judge not to impose or to reduce the sentence through his exercise of the right of allocution. "The contemnor has normally been given an opportunity to speak on his own behalf in the nature of a right of allocution." *Groppi* v. *Leslie*, 404 U.S. 496, 504 (1972).

A recent Court of Appeals decision has expressly upheld the right of an alleged contemnor to allocution before sentencing. In *Weiss* v. *Burr*, 484 F.2d 973, 984 (9th Cir. 1973), the Court noted:

> "The last and most difficult question is whether the trial court's contempt procedures in respect to the three remaining citations infringed Weiss' constitutional right to speak in defense and mitigation before being sentenced. See *Groppi* v. *Leslie*, supra, 404, U.S. at 501. We hold that they did. Due process requires that contempts such as Weiss, who are not cited *and* simultaneously punished for the purpose of either restoring courtroom decorum or protecting the safety of court officials are entitled to an opportunity for allocution."

The Second Circuit has very recently held that there must be a meaningful opportunity to be heard in mitigation of the offense. In *United States* v. *Wilson* and *Bryan*, F.2d (2d Cir., Nov. 28, 1973), the court reversed a summary contempt citation imposed on a witness after an orderly refusal to answer certain questions. To the claim that an adequate hearing was given the alleged contemnors, the court said:

> "Nor is the bare 'opportunity to be heard' dispositive here since the 'hearing' was confined to the matter of sentence. If, however, counsel had been given 'a reasonable time for the preparation of the defense' (Fed. R. Crim. P. 42(b));

she might have marshalled and presented facts in mitigation of the charge. Significantly, the record reveals the possibility of a psychiatric defense, at least for Wilson. Some of Wilson's psychological problems, disclosed by a court-ordered study, were explored at an abortive sentencing hearing on his guilty plea, preceding the refusal to testify. With respect to that conviction, Judge Lasker concluded: 'I do not believe that in this complicated case I have sufficient information before me to permit me justly to proceed to sentence with Mr. Wilson.' Shortly thereafter nonetheless, he proceeded to sentence him for contempt. With additional time to prepare a defense, counsel for Wilson might have enlarged on the issue of appellant's mental health, and perhaps shown a relationship between any psychological difficulties and the refusal to serve as a witness. Finally, because of the posture of the case, the record is silent on other facts which may well exist in defense or mitigation of the charge against both appellants, and which could be properly developed at a plenary hearing."

The Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice has stated:

"F.4 *Notice of charges and opportunity to be heard*

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

Commentary

Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte Terry*, 128 U.S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness and is likely to bring disrespect

upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course. Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice. *The Judge's Role In Dealing with Trial Disruption* 20 (1971).

CONCLUSION

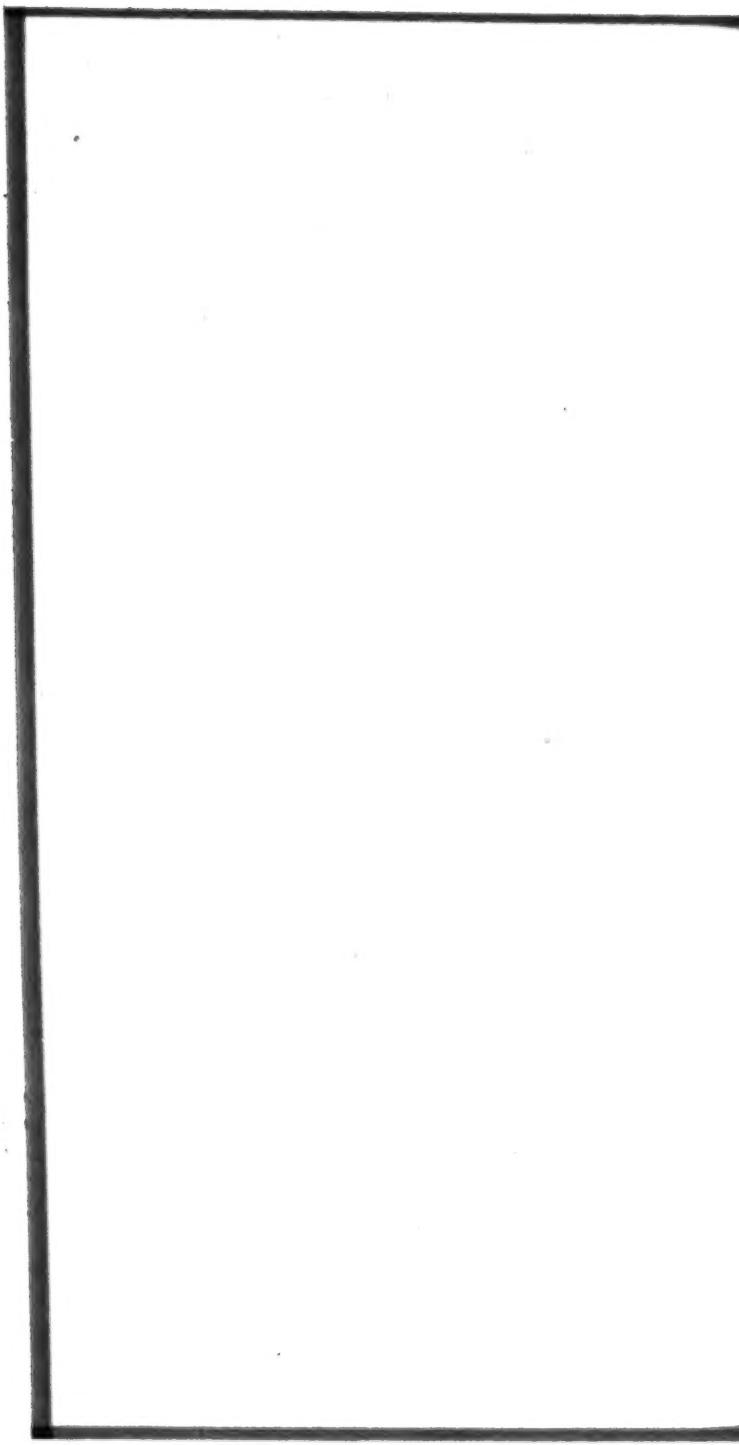
For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorney for Amicus

January 1974



FILE COPY

FEB 15

Supreme Court Of The United States

October Terms, 1973
No. 73-473

DANIEL T. TAYLOR, III - - - Petitioner

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION - - - - - - - - - Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT

HENRY A. TRIPLETT
HOGAN, TAYLOR, DENZER
AND BENNETT
231 S. Fifth Street, Third Floor
Louisville, Kentucky 40202
Attorney for Respondent

LAWYERS PRINTING CO., P. O. BOX 7742, LOUISVILLE, KY. 40207

INDEX

	PAGES
CITATION TO OPINION BELOW	1
JURISDICTION	1- 2
CONSTITUTIONAL PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	2- 3
STATEMENT OF THE CASE	3-12
SUMMARY OF ARGUMENT	12-14
ARGUMENT	15-43
I. In the Circumstances of This Case, the Trial Judge and Respondent Could Impartially Sit in Judgment on Multiple Contempt Charges Against the Petitioner	15-23
II. The Petitioner was not Deprived of Due Process of Law When the Trial Judge Found Him Guilty of Contempt During the Trial, Gave a Reasonable Opportunity for Allocution and Withheld Punishment Until After the Trial	23-33
III. As Petitioner's Sentence was Actually Six Months, He Was Neither Charged With nor Convicted of a Serious Offense Within the Meaning of the Sixth Amendment's Guarantee of Trial by Jury	33-43
CONCLUSION	43-49

AUTHORITIES CITED

PAGES

CASES:

Bartone v. *United States*, 375 U.S. 52, 11 L.Ed. 2d 11, 84 S.Ct. 21 41

Bloom v. *Illinois*, 391 U.S. 194, 20 L.Ed. 2d 522, 88 S.Ct. 1477 ..... 29, 36, 44

Bozza v. *United States*, 330 U.S. 160, 91 L.Ed. 818 41

Caine v. *Commonwealth*, Ky., 491 S.W.2d 824 41

In Re Channels, 131 Ky. 737, 100 S.W. 214 42

Commonwealth v. *Snyder*, Pa., 275 A.2d 312 36

Cooke v. *United States*, 267 U.S. 517, 537 & 69 L.Ed. 767, 774 29

In re Dellinger, 461 F.2d 389, CA 7, 1972 ..... 3, 16

Dimenza v. *Johnson*, 131 F.2d 47, CA 9, 1942 42

Dominick Codispoti and Hurbert Langnes, petitioners v. *Commonwealth of Pennsylvania, respondent*, Miscellaneous #73-5615 22

Edge v. *Commonwealth*, 139 Ky. 252, 129 S.W. 591 42

Furman v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 41

Jackson v. *Commonwealth*, 187 Ky. 760, 220 S.W. 1045, 9 A.L.R. 955 42

Johnson v. *Mississippi*, 403 U.S. 212, 29 L.Ed. 2d 423, 91 S.Ct. 1778 (1971) 16

Kentucky Bar Association v. *Martin*, Ky., 490 S.W.2d 759 37

Kentucky Bar Association v. *Taylor*, Ky., 482 S.W.2d 574 ..... 32, 38-39, 41

Kentucky State Bar Association v. *Brown*, Ky., 302 S.W.2d 834, Income Tax Evasions 38

Kentucky State Bar Association v. *McAfee*, Ky., 301 S.W.2d 899 38

Mayberry v. *Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed. 2d 532 (1971) 3, 15
Miller v. *Stevenson*, Ky., 474 S.W.2d 372 (1971) 32
Offutt v. *United States*, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) 15
People ex rel. v. *Green*, 7 Colo. 237 (1884) 39
Sacher v. *United States*, 343 U.S. 1, 96 L.Ed. 717, 72 S.Ct. 451 ..... 17-21, 22, 23, 29, 30
Southeastern Promotions Limited v. *Conrad*, 486 F.2d 894, CA 6, 1973 22
Taylor v. *Hayes*, Ky., 494 S.W.2d 737 1
Ex parte Terry, 128 U.S. 289, 32 L.Ed. 405 .. 25-29, 30
Tinsley v. *Commonwealth*, Ky., 495 S.W.2d 776 5
Tinsley, petitioner v. *Kentucky*, 38 L.Ed. 2d 484 5
Underwood v. *Commonwealth*, 38 K.L.R. 32, 105 S.W. 151 38
Ungar v. *Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed. 2d 921 (1964) 3, 16
United States v. *Barnett*, 376 U.S. 681, 12 L.Ed. 2d 23, 84 S.Ct. 984 29
United States v. *McKinney*, 466 F.2d 1403, CA 6, 1972 41
United States v. *Seale*, 461 F.2d 345, CA 7, 1972 3, 36
In re Viniard, Ky., 406 S.W.2d 736 41
Young v. *Knight*, Ky., 329 S.W.2d 195, 77 A.L.R. 2d 994 38

Constitutional Provisions, Statutes and Rules:

RCA 3.320 ..... 36–37, 38
U.S. Const. Amend. VI 33
U.S. Const. Amend. XIV 33

Other Authorities:

Legal Ethics, Henry S. Drinker, 1953 Columbia University Press, New York, p. 39 39
The Implosion Conspiracy, Louis Nizer, Doubleday and Company, Inc., Garden City, New York, 1973, pp. 356-357, 464 44–46

SUPREME COURT OF THE UNITED STATES

No. 73-473

DANIEL T. TAYLOR, III — *Petitioner*

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION — *Respondent*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE RESPONDENT

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Kentucky, *Taylor* v. *Hayes*, is officially reported in Ky., 494 S.W.2d 737 and is printed in the Appendix, pages 5-19.

JURISDICTION

The respondent says that this court granted petitioner's petition for a writ of certiorari on December 3, 1973, but limited it to the following questions: (App. 4).

1. When a trial judge summarily imposes consecutive sentences on eight counts of contempt

aggregating four and one-half years' imprisonment, including sentences of one year's imprisonment on two counts, whether he or the appellate court may subsequently, in order to defeat the alleged contemnor's right to trial by jury, reduce the sentences so that the sentence on no one count exceeds six months' imprisonment and direct that the sentences run concurrently for a total of six months' imprisonment?

2. When alleged contempts have been committed by an attorney in the presence of the trial judge and the trial judge proceeds summarily to punish for contempt, whether due process requires that the attorney be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed?

3. Whether, in the circumstances of this case, the trial judge could impartially sit in judgment on multiple contempt charges against the petitioner?

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent agrees that petitioner has claimed rights under the Sixth and Fourteenth Amendments to the United States Constitution, but does not agree that any right of petitioner's has been violated.

QUESTIONS PRESENTED

1. When a state trial judge corrects judgments of contempt with the approval of the state's highest court and the result is that the contemnor's actual sentence does not exceed six months, does this violate contemnor's right to a trial by jury?

2. Where, during the trial, petitioner and contemnor has been held in contempt outside the presence of the jury and throughout the trial given reasonable opportunity to respond, and where, in some cases, petitioner availed himself of the opportunity, and in other cases he did not, was he entitled to a further hearing before punishment was imposed?

3. Where, after petitioner and contemnor was adjudged to be in contempt for the first time, and this contempt finding was later modified to a warning, and where throughout a protracted trial the respondent, the presiding judge in a murder trial, showed consideration to petitioner, a lawyer, and where there were no obscenities, vilifications or vitriolic exchanges, and where the entire record showed that respondent acted with restraint, and none of the facts which existed in *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed. 2d 532 (1971), *United States* v. *Seale*, 461 F.2d 345, CA 7, 1972, *In re Dellinger*, 461 F.2d 389, CA 7, 1972, or *Ungar* v. *Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed. 2d 921 (1964) existed, was the trial judge required to recuse himself and allot the case to another judge for the imposition of the sentences on the contempt judgments?

STATEMENT OF THE CASE*

The respondent, John P. Hayes, at all times material herein was and is Judge of the Jefferson Circuit Court,

* References to the transcript of the trial of *Commonwealth* v. *Tinsley* that are not included in the Appendix are indicated by the prefix "Tr." References to the Transcript of Record in *Commonwealth* v. *Tinsley* are indicated by the prefix "R."

Criminal Branch, Second Division, a court of general jurisdiction within the Commonwealth of Kentucky. Jefferson County is Kentucky's largest county, and Louisville is its county seat. It has seven Common Pleas Judges, six Chancellors and three Criminal Judges for a total of sixteen Circuit Judges.

These proceedings arose from the trials of Narvel Tinsley and William Michael Tinsley. The petitioner represented Narvel Tinsley, and Messrs. Robert Flemming, Tim McCall and Charles Scott represented William Michael Tinsley. It was alleged that William Michael Tinsley and his brother, Narvel Tinsley, murdered two Louisville policemen. The evidence showed that William Michael Tinsley shot one policeman, and Narvel Tinsley shot the other.

The slaying of the two officers and the ensuing events engendered much publicity via the media, and this was compounded by Narvel Tinsley's escape from the Jefferson County Jail shortly before the trial commenced. Because of this, the trial judge permitted great latitude on voir dire and only limited it when the privilege was obviously being abused. It took three days, four volumes and 720 pages to select fourteen trial jurors (TR Vols. 1, 2, 3 and 4).

During the trial, several motions were made for a severance and for a mistrial. The motions were primarily made by counsel for William Michael Tinsley, although joined in by petitioner, because the defenses between the two Tinsleys were antagonistic and because counsel for William Michael Tinsley contended that the conduct and antics of the petitioner, counsel for Narvel Tinsley, were greatly prejudicing the rights of William Michael Tinsley. These motions were all overruled. The

Kentucky court affirmed the convictions of William Michael and Narvel Tinsley, *Tinsley* v. *Commonwealth*, Ky., 495 S.W.2d 776. Certiorari was denied William Michael Tinsley, #73-5517, *William Michael Tinsley, petitioner* v. *Kentucky*, 38 L.Ed.2d 484.

The complexities of the trial coupled with the seriousness of the charges and the possible verdicts called for the most careful and studied advocacy. It is obvious from a cursory examination of the transcript that the worst possible tactic would be to inflame or antagonize a jury already combustible because of the basic facts of the case. Notwithstanding this, the petitioner proceeded to engage in conduct and demean himself in such a manner that causes utter disbelief when considered in view of the total circumstances. We turn now to the events leading to the respondent's citation of petitioner for eight separate counts of criminal contempt.

We start with Volume II of the Transcript (TR 347) (App. 30) where the court for the first time held Mr. Taylor in contempt for repeatedly asking questions he had been directed not to ask. At this point, the court indicated it was going to take over the voir dire, and the colloquy continued through TR 358 (App. 37). The respondent rescinded his order of contempt and warned Mr. Taylor. Respondent admonished Mr. Taylor that his rules were to be obeyed (TR 357) (App. 367). The court softened his ruling relative to taking complete control of the voir dire (TR 354) (App. 34). A complete discussion was engaged in between court and counsel relative to petitioner's conduct. It is obvious that respondent showed great restraint and great considera-

tion in the proceedings concerning this first incident (App. 39).

The first actual contempt citation was not imposed until Friday, October 22, 1971 (App. 42-54) when the court cited Taylor for contempt because he completely and continuously ignored the court's order not to discuss Narvel Tinsley's escape from the Jefferson County Jail. The court also criticized Taylor's courtroom antics, and a colloquy took place. Taylor had referred to the escape at TR 1078 and after an objection was sustained to it at TR 1078, he referred to that "little old case in the Jefferson County—." Taylor was given an opportunity to respond for the record. (Although Taylor had been told directly by the court how to use a previously written statement, TR 1072, he ignored this at TR 1075, 1076, and proceeded to inferentially and directly disregard the court's order (TR 1071, 1080).)

The next contempt citation occurred October 23, 1971 and may be found at App. 56. After the court admonished Taylor to stop arguing, Taylor replied, "I'll certainly keep that in mind, Your Honor.", in a contemptuous and smart aleck manner. Taylor responded to this citation (App. 56-64). The court comments on Taylor's tone of voice, his motions and his antics at App. 59.

The next contempt occurred during the cross-examination of Narvel Tinsley by Mr. Schroering (App. 69). The court told Taylor to sit down. Taylor interrupted, the court overruled him, Mr. Taylor continued, and the court overruled him again, at which time the proceedings were adjourned to Chambers where again Taylor was cited for contempt of court

(App. 69). Mr. Taylor was permitted to respond (App. 70-79). While in Chambers and at TR 1804, the court again admonished petitioner when he ruled that was it and that when he told Taylor to sit down, he meant sit down. In other words, he told him to stop arguing with every ruling of the court and to obey the orders of the court. We note Mr. Schroering's comments about Mr. Taylor's behavior (App. 78-79).

The next contempt occured in Volume XIII of the Transcript and involved Taylor's direct examination of Ervin Foley, Legal Advisor to the Police Department (App. 97). Taylor was given an opportunity to respond to the contempt citation. An objection had been sustained to Taylor referring to a press conference, and he became obstreperous with the court relative to some seating arrangement and gave a smart aleck reply to the court's ruling (App. 95-96). The next contempt involved witness, Jesse Taylor, and related to the use of a statement. The court had sustained an objection to Taylor's use of the statement (App. 105) and notwithstanding this, Taylor continued to ask the very questions to which the court had sustained an objection (App. 105-106) and respondent again held him in contempt and told Taylor he could respond at the next recess (App. 107).

Contempt number seven again involved Taylor going into the press conference and for waving his arms at a witness in such a fashion that caused counsel for William Michael Tinsley to object (App. 108). When Taylor was actually held in contempt and given an opportunity to respond for the record, he did. After the court returned, he wanted the record to reflect that at no time had Mr. Schroering been held in contempt. The

fact that the court briefly left the room in no manner prevented Taylor from denying that he had disobeyed the court's order or that he had not flapped his arms in a contemptuous manner. As far as the record shows, he may have responded, but if he did not, no bystander's bill was presented or filed.

The next contempt occurred at App. 113. Taylor had completed the direct examination of Lt. Garrett when it was called to the court's attention that one of Mr. Taylor's aides had not been searched. The court told Taylor to proceed and Taylor refused. Although the court directly told Taylor to proceed, Taylor refused. He responded (App. 115-116).

The last contempt occurred at App. 117-119 when Taylor asked witness Miller if he had "talked with this nice police officer—." This inspired an outburst of laughter from the audience (App. 118). Taylor continued his improper examination of this witness in direct disobedience to the court's order (App. 119), and Taylor made no request to be heard in defense or mitigation.

He responded to all contempts in his final argument (App. 119).

The foregoing actions on the part of Taylor were all in direct disobedience to a direct order of the court. All of the actions were designed and calculated to demonstrate utter disrespect to the court and the total administration of justice. Taylor was given a reasonable chance to respond, yet at no time during the entire transcript are any of the facts upon which the contempt charges were based put into serious issue. It will be observed that during these entire proceedings, the court

exercised restraint, was most careful not to cite Taylor for contempt in the presence of the jury and did everything but beg him to behave himself. This Taylor disdainfully refused to do.

We are mindful that this court did not grant certiorari on the question of whether or not Taylor's actions were contemptuous. We have, however, reviewed the testimony which gave rise to the contempt citations for the purpose of showing that Taylor was granted allocution and for the further purpose of demonstrating to this court that the respondent had no personal embroilment with Taylor which would prevent him from fairly imposing sentences at the conclusion of the trial. Otherwise, the respondent would have cited Taylor numerous times as this record demonstrates for things that were said and done in Chambers, e.g. App. 83.

Oftentimes while a jury is out, lawyers make motions to take up other matters with the court. This record is barren of any effort on Taylor's part to further respond to the contempt citations.

Taylor argued the case for Narvel Tinsley (TR 2196-2245), but he spent more time in the defense of his own conduct than he did that of Narvel's.

After the verdict, the polling of the jury, and oral motions for a new trial on behalf of William Michael Tinsley and Narvel Tinsley, respondent imposed punishment on petitioner for the contempts of which he stood convicted (TR 2285-2287). The point should be made here that it is respondent's position that allocution was granted before the punishments were imposed. The allocutions were granted at the time the contempts occurred, or at least the reasonable opportunity was

given to respond, up until the sentencing transpired. We make the point now because it will be emphasized throughout this brief. We would ask the Court to remember that at some point the court must have the last word. It must also be remembered that the contempts for which petitioner was cited occurred in open Court in the presence of the jury, were transcribed by the official court reporter, but the actual citations were not imposed except in Chambers or out of the hearing of the jury.

After punishment was imposed, the judgment imposing the sentences was corrected, the sentences reduced and the requirement that the sentences be served consecutively was eliminated. This was done on notice to petitioner's counsel (App. 27), and oddly enough petitioner's counsel objected. Although petitioner now claims that this was a deliberate action on the part of respondent to deny him a trial by jury, this was not the basis of petitioner's response to Judge Hayes' motion to correct the judgment.[1]

[1] Court of Appeals of Kentucky, Daniel T. Taylor, III, Petitioner-Appellant, v. John P. Hayes, Jefferson Circuit Court, Criminal Branch, Second Division, Respondent-Appellee, Response to Motion to Correct Judgment. Comes now, Daniel T. Taylor, III, petitioner-appellant herein, by counsel, and asks that the Court deny the motion of the respondent-appellee to correct the judgment entered in the above case. In response to this motion petitioner-appellant shows to the Court as follows: 1. The motion is made under RCr 10.10, which refers only to clerical mistakes and errors arising from oversight or omission. The motion states that there should be eight counts of contempt instead of nine, the first count having been changed to a warning. It then states that the motion is made to comply with recent Supreme Court cases. 2. Nowhere does the respondent-appellee indicate when the first count was changed to a warning. He does not state that it was done during the trial, and it was not. Obviously conscious of having committed serious reversible error, he is trying to undo his action retroactively. This cannot be done. 3. The respondent-appellee held the petitioner guilty on nine counts of contempt and sentenced him to four and one-half years in prison, as the record reveals. If he gave a proper warning during the trial, this will appear in the record. The record and the respondent-appellee's actions speak for themselves, and it is on this record

After Taylor's appeal was perfected to the Court of Appeals of Kentucky, exhaustive briefs were filed on petitioner's behalf. The highest court of Kentucky rendered its opinion (App. 5-21), and in essence it held:

(1) That Taylor's actions were deliberate and clearly contemptuous.

(2) That the actual sentence Taylor must serve did not exceed six months.

(3) "That a great percentage of the trial time was consumed by the court and counsel attending speeches made by Taylor in the Court's Chambers."

(4) That Judge Hayes was not disqualified to act because of any personal embroilment in the controversy as an "activist seeking combat" or by reason of personal attacks upon the Judge which in themselves carry a potential for bias.

(5) That Taylor was warned upon each occasion of his contemptuous action and of the court's holding that he was in contempt.

(6) That as the corrected judgment did not direct that the sentences as amended be served consecutively, they must be served concurrently and that, therefore, the total sentence actually imposed is a jail sentence of six months, and that because of this, Taylor was not entitled to a trial by jury.

This case has been comprehensively and ably briefed on behalf of petitioner, and it will be noted that the

(Footnote continued from page 10)
that the validity of his actions must be determined. Wherefore, the motion should be denied. Robert Allen Sedler, College of Law, University of Kentucky, Lexington, Kentucky 40506, Attorney for Petitioner-Appellant. Notice of Service—I hereby certify that a copy of the foregoing response was sent to the respondent-appellee at his office address by mail, first-class postage prepaid, this the 16th day of February, 1972. Filed February 17, 1972. Frances Jones Mills, Clerk, Court of Appeals, (Record of Proceedings, Court of Appeals of Kentucky).

respondent has freely consented to the filing of briefs for amicus curiae. Confronted with the plethora of solemn legal pronouncements made by our learned brothers, it is with some trepidation that we now turn to the argument of this case. Being aware that this court will read petitioner's last argument last, we will argue in inverse order.

SUMMARY OF ARGUMENT

I. The worst argument any lawyer can ever make in a brief is to request the court, if there is doubt about it, to read the entire transcript. The transcript in this case consists of fifteen volumes. We stand on the proposition that respondent's actions and treatment of petitioner did *not* demonstrate such personal embroilment or hostility as to require respondent to recuse himself from passing sentence upon petitioner. The record is replete with instances of courteous and fair treatment of Taylor by Judge Hayes, and it is odd that if his intention was to "bait Taylor" the respondent would have rescinded his first order of contempt and engaged in a free and frank discussion of his conduct. The contention that respondend was deliberately out to get Taylor is utter nonsense and unworthy of those who make it. There were no vilifications, no insults, no shouting matches, no epithets or anything else in this record that would demonstrate a personal hostility. Just because a judge might say to a lawyer, "If you don't stop this nonsense, you're going to be found in contempt and maybe sent to jail", does not indicate a personal bias. In fact, any judge worth his salt would do just exactly as Judge Hayes did here, and that is rescind his first order of con-

tempt, warn Taylor thoroughly and further provide that the proceedings were to be kept private so no opprobrium would attach to Taylor that could possibly interfere with the trial of the case.

II. Petitoner's claim that he was deprived of due process of law when the trial judge proceeded summarily to find him guilty of contempt and to impose punishment totally ignores what happened during this trial. First, Taylor was warned about his conduct. Second, each time during the trial that he was cited for contempt, he was so told by the respondent and he was given a reasonable opportunity to respond. In each instance, he was told or knew what he had done. He had ample opportunity to respond and in most instances did ad nauseam. In no instance did he put in issue the happening of the event for which he was cited. Admittedly, he argued about the statement, the blackboard, and the seating arrangements, and the court's ruling thereon, but the reason he was held in contempt was because he disobeyed a direct order of the court while the trial was in process. The contention or suggestion that this court should consider whether summary punishment for contempt itself is violative of due process ignores reality. Regrettably and because of people like petitioner, a court must possess the summary power of contempt. This argument overlooks the rights of others to a fair and orderly trial. This argument overlooks the stark fact that there are people who will deliberately disrupt the trial to gain a legal end. The public has some rights here, and notwithstanding amicus' views to the contrary, other lawyers have some rights here.

III. Petitioner's claim that the original sentence is inviolate and that the subsequent modification thereof is of no effect and that, therefore, petitioner's right to a trial by jury was violated is ill-founded. This court has held that the "actual sentence to be served" is determinative of whether an offense is a serious one or a petty one and determinative of the right to a trial by jury. Although respondent and the Court of Appeals of Kentucky held ultimately the sentences should be served concurrently, thereby putting a maximum six months upon it, we are not at all certain that this is the best rule. Why should a limit of six months be set forth in advance unless the trial court chooses to engage in the exhaustive process of empaneling a jury and retrying the whole issue, which the trial court saw and heard, and then giving the jury vague instructions relative to guilt and punishment? If, during the trial of a case, a contemnor commits thirty contempts, each one warranting thirty days in jail, why should he not serve thirty months in jail? If a man is found guilty of three storehouse breakings and given the maximum of five years on each, the trial judge has the option of determining whether they should be served concurrently or consecutively—five years or fifteen years. Why should the rule be any different for a contemptuous lawyer? If a person is locked up and convicted for drunk driving twice in the same day, that person can certainly receive two sentences and elongate the period for which his license is revoked. Thus, it might be well to inhibit the right of a trial by jury in a contempt case rather than enlarge it.

ARGUMENT

I.

IN THE CIRCUMSTANCES OF THIS CASE, THE TRIAL JUDGE AND RESPONDENT COULD IMPARTIALLY SIT IN JUDGMENT ON MULTIPLE CONTEMPT CHARGES AGAINST THE PETITIONER.

We are absolutely amazed that petitioner and amicus with a straight face can argue that respondent's attitude and treatment of petitioner during the protracted trial involved here demonstrated "animus and hostility . . . " or that he was an "activist seeking combat" or "obvious lack of impartiality." In an obvious attempt to mislead this court, petitioner has lifted discrete items from the transcript in an attempt to make his point. A review of the colloquy (App. 30-37) completely disposes of the scurrilous remarks made by petitioner relative to respondent's bias. It is inconsistent with hostility, bias and all other ugly terms employed that respondent would rescind the contempt order after a complete and frank discussion with petitioner. All during the trial respondent would remind petitioner that when he made an order, even if he was wrong, petitioner must obey it. Any other situation would result in chaos.

With the use of unfair and incomplete quotes from the transcript, petitioner attempts to equate the situation here to cases like *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed. 2d 532 (1971), where Mayberry hurled vile epithets at the trial judge, *Offutt* v. *United States*, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954), which was characterized as a shouting match,

and *Johnson* v. *Mississippi*, 403 U.S. 212, 29 L.Ed. 2d 432, 91 S.Ct. 1778 (1971), where the trial judge was a defendant in a lawsuit brought by the contemnor. Nor is the case like *In re Dellinger*, 461 F.2d 389, CA 7, 1972, wherein counsel and the trial judge had a continuous verbal exchange for four and a half months in front of the jury.

This case more nearly fits *Ungar* v. *Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed. 2d 921 (1964). Among other things, Ungar said to Judge Sarafite, "I am not going to answer your questions Your Honor. I am not going to testify in this confusion and the court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of Your Honor's attitude and conduct toward me. I am being coerced and intimidated and badgered. The court is suppressing the evidence." Whereupon, Judge Sarafite replied, "You are not only contemptuous but disorderly and insolent." It will be remembered that Ungar, although a witness, was also a lawyer. A majority of this court affirmed Ungar's conviction for contempt by Judge Sarafite. The contempt judgment was imposed two days after the trial. Mr. Justice Harlan concurred and stated that the contempt procedure employed by Judge Sarafite accorded Ungar more than is due and that Judge Sarafite could have proceeded immediately after the trial. It will be remembered that Judge Sarafite had not told Ungar that he was in contempt during the trial and would be punished later as was done in the case at bar by respondent. Mr. Justice Goldberg's dissent is interesting in that he stated that he was convinced that the contempt charge was not such an open threat to the orderly

procedure of the court as to necessitate instant punishment. If the words "you are not only contemptuous but disorderly and insolent" made during the trial by the judge are not sufficient to disqualify, then nothing that Judge Hayes said to Taylor during the trial of this case comes anywhere close. If Judge Hayes had said nothing to Taylor during the trial, Taylor would now argue that he was never warned. Judge Hayes' remarks at the time he sentenced petitioner are totally irrelevant to the claim of bias or hostility.

Let us now review *Sacher* v. *United States*, 343 U.S. 1, 96 L.Ed. 717, 72 S.Ct. 451. To quote from the dissent, "After a nine months trial of leaders of the Communist Party, a jury brought in a verdict of guilty and was discharged. Immediately, presiding Judge Medina asked all the defendants' lawyers to stand up, then read them a very minor part of a lengthy 'contempt certificate' in which they were alleged to have committed many acts of contempt at various times during the protracted trial. Without affording any of them the chance to say a word before he acted, the presiding judge held all of them guilty of contempt and sentenced each one to prison."

During the trial, the court called one lawyer a liar and another a communist. The court told Sacher that he was becoming positively insolent. The court felt that he was being accused of being in connivance with the United States Attorney, and he understood that he was being charged with being biased, prejudiced, corrupt and everything else.

The claim was made in this court that the contempts should have been dealt with by another judge. Although in *Sacher* counsel repeatedly were warned that their

conduct was regarded as contemptuous, no actual contempt citations were made until after the trial. Therefore, no opportunity to respond or response was present in *Sacher* as was present here. The Appendix reveals that there was constant rangling between counsel and Judge Medina.

We think certain language contained in *Sacher* is so relevant here that we set it forth in its entirety:

> Summary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes. But the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary. Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders.
>
> In this case counsel repeatedly were warned that their conduct was regarded as contemptuous. No

claim can be made that the judge awaited the close of the trial to pounce upon them for some offense

*[11]

unnoted at the time *it occurred. If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted.

We are urged that these sentences will have an intimidating effect on the legal profession, whose members hereafter will decline to appear in trials where "defendants are objects of hostility to those in power," or will do so under a "cloud of fear" which "threatens the right of the American people to be represented fearlessly and vigorously by counsel."

That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir. Most judges, however, recognize and respect courageous, forthright lawyerly conduct. They rarely mistake overzeal or heated words of a man fired with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. They recognize that our profession necessarily is a contentious one and they respect the lawyer who makes a strenuous effort for his client.

The profession knows that no lawyer is at the mercy of a single federal trial judge. This case demonstrates

*[13]

*that before punishment takes effect he may have

appeal on law and fact to the Court of Appeals. Petitioners, as yet, have served no part of their sentences but have been enlarged on bail while their conduct has been directly reviewed by one Court of Appeals on their own appeal and considered indirectly by a differently composed Court of Appeals on their clients' appeal. Some of those judges had trial and appellate experience almost unparalleled in length and variety. These lawyers have not been condemned, as they claim, merely by the impulse of one lone and hostile judge. Their conduct has been condemned by every judge who has examined this record under a duty to review the facts. It is to be doubted whether the profession will be greatly terrorized by punishment of some of its members after such extended and detached consideration. Moreover, if power of contempt excites fear and terror in the bar, it would hardly be relieved by upholding petitioners' contention that the judge may proceed against a lawyer at the precise moment of maximum heat but may not do so if he awaits a cooler second thought.

We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice. But we think it must be ascribed to causes quite apart from fear of being held in contempt, for we think few effective lawyers would regard the tactics condemned here as either necessary or helpful to a successful defense. That such clients seem to have thought these tactics necessary is likely to contribute to the bar's reluctance to appear for them rather more than fear of contempt.

But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining

> to the office of the advocate on behalf of any person whatsoever. But it will
>
> *[14]
>
> *not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling.

Comparing the record here with the record in *Sacher* is like comparing Heaven and Hell.

On analysis of all the possibilities, we are convinced that Judge Hayes acted in the best possible way. Let us illustrate. If Judges Hayes had done nothing during the trial and made no citations for contempt but after the trial had charged Taylor with various contempts, two things would have occurred. One, the trial would have become completely out of control and no one would have secured a fair trial. Second, Judge Hayes would have been accused of discretely searching the record for infractions which might constitute contempt, and any claim that the contempt citations were necessary to maintain an orderly trial would have been weakened. On the other hand, let's assume Judge Hayes at the time he cited Taylor for contempt also imposed sentence. Taylor would have then contended that he was under such a psychological handicap that he could not continue to adequately represent his client, and Judge Hayes would have been accused of making an intemperate judgment because he was still upset about the event which inspired the contempt citation.

What Judge Hayes did was cite for contempt during the trial so that Taylor would know what he had done and possibly be a deterrent for future contempts. After

it was all over and there was time for this, Judge Hayes could then adequately reflect about the amount of sentence that should be imposed.

Petitioner would have another judge pass on these contempts. Pending in this court, Miscellaneous #73-5615, is the case of *Dominick Codispoti and Hurbert Langnes, Petitioners* v. *Commonwealth of Pennsylvania, Respondent.* Codispoti and Langnes were successful in obtaining another judge because they had been so intemperate with the first one that he was adjudged to be incapable of dealing them on a rational basis. An answer to the petition for a writ of certiorari and brief for respondent in opposition was filed by Robert W. Duggan, District Attorney, Allegheny County, Pennsylvania. On page 14 of the respondent's brief above-referred to, Mr. Codispoti rather graphically articulates his feelings about the second judge. Because the language is so obscene, we will not repeat it here. Suffice to say, it makes some of the language used in the play "Hair" sound like the Sermon on the Mount. *Southeastern Promotions Limited* v. *Conrad,* 486 F.2d 894, CA 6, 1973.

Codispoti demonstrates the fallacy that having another judge hear the contempts is an absolute answer. Following Codispoti's course, he can now claim that the second judge was so vilified by him that he should yet have a third one and so on. Suppose instead of a judge, Codispoti had made those remarks to a jury. Would the jury then be deemed disqualified because it had been so vilified? No, such a rule will not work. The only answer is the one that Mr. Justice Jackson gave in the last paragraph of the opinion in *Sacher,* supra, when he was

speaking for the majority of the court. The right of appellate review from a contempt judgment now exists as a matter of right in Kentucky, and this Court has commendably demonstrated a willingness to hear contempt cases particularly when lawyers are involved. Will an appellate court be less biased than a brother trial judge? Of course it will. This is the reason for the rule in *Sacher*, and the reason why petitioner's claim here is factually, legally and philosophically unsound and unworkable.

ARGUMENT

II.

THE PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW WHEN THE TRIAL JUDGE FOUND HIM GUILTY OF CONTEMPT DURING THE TRIAL, GAVE A REASONABLE OPPORTUNITY FOR ALLOCUTION AND WITHHELD PUNISHMENT UNTIL AFTER THE TRIAL.

The heart of petitioner's claim in his second argument is that summary punishment for contempt in itself is violative of a person's right of due process of law. He first argues that the right of allocution does exist as a matter of right where summary contempt powers are used, and second, he argues that petitioner was not afforded this right.

Petitioner and respondent are in total disagreement about this. We claim the record shows that he was given a reasonable right to speak after he was found to be in contempt. It will be remembered, and we have stated this before, that every time the Trial Court found petitioner to be in contempt he was cited in Chambers

or not before the jury. Petitioner was advised that the punishment would be decided later, and no objection was made by petitioner to this procedure (App. 30).

First, it is our contention that when summary criminal contempt is imposed, the right to be heard does not exist. Summary contempt occurs when the contemnor commits an act which the judge can see or hear. All of the contempts in this case fall within that category. All of the contempts occurred in front of the jury. At no time did the Trial Judge impose contempt for anything Taylor did or said in Chambers or any place else. The Court of Appeals of Kentucky held that there were numerous other incidents where a contempt filing would have been justified. The Court of Appeals also found that a large part of the trial time was consumed as a result of Taylor's speeches. We have not done so, but if all the words spoken in this trial were counted, we think it would be safe to assume that at least one-third of them came from Taylor. No right, no point, no argument, no position was left unstated. A good bit of it apparently was done to impress someone about Taylor's ability o speak and his command of the English language. Some people never tire of hearing their own voice, and this transcript is a classic example of it. In contempt #1, which was rescinded, Taylor responded for eight pages (App. 30-37). Contempt #2 involved a hearing in Chambers which consumed 16 pages (App. 42-54). Contempt #3 involved a proceeding in Chambers which consumed 14 pages (App. 56-69). After the next contempt, the response colloquy took ten pages (App. 69-79). The next one went eight pages (App. 97-105), and it included an off the record discussion (App. 100), to

which no objection was made. At the next one (App. 107) Taylor asked for an exception which was granted, reserved his right to speak for the record which the court granted, and another contempt was imposed in Chambers (App. 108) where Taylor was given the right to speak for the record (App. 109). Taylor objected to the colloquy off the record but offered no bystanders bill. The next contempt involved a deliberate and direct disobedience of a court order (App. 112), and a response to this contempt did occur (App. 115-116). The next one occurred when Taylor continued to ask a question to which an objection had been sustained (App. 119), and he was held in contempt at the bench out of the presence of the jury and no request was made to be heard. In his final argument to the jury, he responded (App. 119). So, petitioner's claim that he was not granted allocution on the right to speak in mitigation or the right to apologize or the right to explain is absolutely defied by this transcript.

As we understand the law of summary criminal contempt, no right to be heard exists. We start with *Ex parte Terry*, 128 U.S. 289, 32 L.Ed. 405. During a hearing before a Supreme Court Justice, a Federal Circuit Judge and a U. S. District Judge, one Sarah Terry became obstreperous. The Marshal was ordered to remove her from the courtroom and when he proceeded to do so, he was attacked by Mrs. Terry's husband, David Terry, who was a lawyer. He was summarily held in contempt and sentenced to six months in jail. A petition for a writ of habeas corpus was filed, and the petition was denied. Terry claimed he was not given the opportunity to be heard, and he had no notice of the

court's intention to hold him in contempt. The Supreme Court in disposing of this contention said:

> Blackstone thus states the rule: "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of comtempt, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute the original rule." 4 Bl. Com. 286. In Bacon's Abridgment, title, *Courts*, E, it is laid down that "Every court of record, as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court, and immediately order them into custody." It is utterly impossible, said Abbott, *C. J.*, in *Rex* v. *Davison*, 4 Barn. & Ald. 329, 333, "that the law of the land can be properly administered if those who are charged with the duty of administering it have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for

that of the public. And a judge will depart from his bounden duty if he forbears to use it when occasions arise which call for its exercise."

To the same effect are the adjudications by the courts of this country. In *State* v. *Woodfin*, 5 Ired. L. 199, where a person was fined for a contempt committed in the presence of the court, it was said: "The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances, and the only means of doing that is by immediate punishment. A breach of the peace *in facie curia* is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry *de novo* in another court, as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, nor issue upon which there can be a trial." So in *Whittem* v. *State*, 36 Ind. 196: "When the contempt is committed in the presence of the court, and the court acts upon view and without trial and inflicts the punishment, there will be no charge, no plea, no issue and no trial; and the record that shows the punishment will also show the offense, and the fact that the court had found the party guilty of the contempt; on appeal to this court any fact found by the court below would be taken as true, and every intendment would be made in favor of the action of the court." Again, in *Ex parte Wright*, 65 Ind. 508, the court, after observing that a direct contempt is an open insult in the face of the court to the persons of the judges while presiding, or a resistance to its powers in their presence, said: "For a direct contempt the offender may be punished instantly by

arrest and fine or imprisonment, upon no further proof or examination than what is known to the judges by their senses of seeing, hearing," etc. 4 Steph. Com. Bk. 6, chap. 15; Tidd, Pr. 479-80; *Ex parte Hamilton*, 51 Ala. 68; *People* v. *Turner*, 1 Cal 155.

It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community, What was said in *Ex parte, Kearney*, 20 U. S. 7 Wheat. 39, 45 [5:391, 393], may be here repeated: "Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the Legislature, and is not to be devised by courts of justice."

It results from what has been said that it was competent for the circuit court, immediately upon the commission, in its presence, of the contempt recited in the order of September 3, to proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form. It was not bound to hear any explanation of his motives, if it was satisfied, and we must conclusively presume, from the record before us, that it was satisfied—from what occurred under its own eye and within its hearing—that the ends of

justice demanded immediate action, and that no explanation could mitigate his offense or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment. Whether the facts justified such punishment was for that court to determine under its solemn responsibility to do justice, and to maintain its own dignity and authority. *Re Chiles*, 89 U.S. 22 Wall. 157, 168 [22:819-823].

In *U. S.* v. *Barnett*, 376 U.S. 681, 12 L.Ed 2d 23, 84 S.Ct. 984, fifty cases are cited in a footnote where this court has supported summary disposition of contempts. In *Bloom* v. *Illinois*, 391 U.S. 194, 20 L.Ed. 2d 522, 88 S.Ct. 1477, the following language from *Cooke* v. *United States*, 267 U.S. 517, 537 and 69 L.Ed. 767, 774 is cited:

> Due process of law, therefore, in the prosecution of contempt, **except of that committed in open court, requires that the accused should be* advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. (*Emphasis ours).

We have heretofore cited *Sacher* v. *United States*, 343 U.S. 1, 96 L.Ed. 717, 72 S.Ct. 451, which involved citations for contempt and the punishments for contempts at the end of the trial without allocution. The procedure employed here falls well within *Sacher* and within all of the summary contempt cases cited here. Even though the law does not grant the right to be

heard, in most instances the petitioner was granted the opportunity.

The considerations necessitating summary contempt power are articulated in *Ex parte Terry*, supra, and *Sacher* v. *United States*, supra. The argument advanced by petitioner and amicus does not consider the rights of other people in orderly judicial and trial process. The public funds the judicial system through the payment of taxes. The courts are both a sword and a shield. People secure rights and have rights protected in courts. As a Kentucky judge once put it, "Every defendant is entitled to at least one tolerably, fair trial." The public, the prosecutor, the jurors, the lawyers and the courts are entitled to no less. A license to practice law does not give an attorney the right to say and do as he pleases in a courtroom. If there is no machinery for immediate restraint an amoral lawyer can secure an unjust advantage.

Much of what has been written about contempt power relates to the necessity of maintaining the dignity of the court. This, of course, is a relevant consideration, but the right to a fair and orderly trial is probably the most important. The public spends a small fortune putting the machinery of justice in action, and no one lawyer has a right to subvert this by outrageous conduct and a stark refusal to adhere to the basic standards of trial decorum and good manners. Why should jurors who are summoned from their home or work involuntarily be subjected to this? If the court declares a mistrial because of antics similar to those which have occurred here, the claim of jeopardy immediately arises. If the court is not very careful what it does, the right to counsel

is abrogated. There have been a paucity of cases involving summary contempt. Most judges use it very sparingly and are conscious of the great power they have. In this case, the offense was really two-fold. The contempts intertwined with an absolute disregard for the rights of the client. Antics such as Taylor performed here must have prejudiced his client. At least, the tactics did not help Tinsley. We doubt if Taylor, however, will ever seek reversal of Tinsley's conviction or petition for a writ on the ground that Tinsley was inadequately represented. The trial of a criminal case is one of the most serious responsibilities a lawyer can ever have. To perform the responsibility in the way Taylor performed it here and allow it to go unnoticed would be one of the worst indictments the legal profession has ever had. Rudeness to jurors, rudeness to the court, rudeness to the other lawyers involved in the case combined with the contemptuous acts compel the retention of summary contempt power.

The amicus brief on behalf of the Association of the Bar of the City of New York says, that, "The threat of a later criminal trial, with the possibility of a conviction and severe penalties, is a sufficient deterrent against further disobedience within the court." The transcript of this trial proves beyond cavil that such a threat would have been no deterrent to Taylor because after the first contempt citation, which was rescinded, he escalated his contemptuous activities. The fear of disciplinary ac-

tion by the Bar Association is obviously no deterrent because he has been that route before. *Ky. Bar Association* v. *Taylor*, Ky., 482 S.W.2d 574. You could not gag Taylor or bind him because then his client would have had less of a lawyer than he had. With the exception of a minute number of those licensed to practice law, no deterrent is necessary. All but a very few, we are proud to say, do everything possible to maintain the high standards of the profession. It is not fear of punishment or sanction that prevents the average lawyer from becoming obstreperous and contemptuous but it is an affirmative regard for the rights of others and the high privileges lawyers have. We think the statement that lawyers behave themselves because of fear is one of the most derrogatory things that we have ever seen written about the profession. Anyone who would make such a statement has seriously misjudged the caliber of people who comprise the bar. Judges do not have to summarily punish lawyers other than those of Taylor's ilk. If, on a bad day, he does incorrectly, the appellate courts have been quick to reverse, e.g., *Miller* v. *Stevenson*, Ky., 474 S.W.2d 372 (1971). We note that the amicus curiae brief on behalf of the Association of the Bar of the City of New York is signed by two law teachers. Suppose one day in class a student with complete disregard of the rights other students decided he was going to disrupt the class. Would these two teachers have the student summarily ejected or would they benignly threaten him with later administrative sanctions? Would these two teachers agree that a dissident student should have a right to a trial by jury of other students? We think not, and while this may be an absurd analogy, it is no less absurd than the point claimed.

So, to sum this portion of the argument once again, we say first procedural due process was granted including the right to be heard, and second, the right to be heard was granted even though it was not required. The power of summary contempt must exist because of petitioner and those like him. Petitioner was told of and knew the exact offense he had committed, and this proposition is so clear that this court would not grant certiorari on whether Taylor's actions were contemptuous.*

ARGUMENT

III.

AS PETITIONER'S SENTENCE WAS ACTUALLY SIX MONTHS, HE WAS NEITHER CHARGED WITH NOR CONVICTED OF A SERIOUS OFFENSE WITHIN THE MEANING OF THE SIXTH AMENDMENT'S GUARANTEE OF TRIAL BY JURY.

The Court of Appeals of Kentucky (App. 18-20) has so clearly and succinctly disposed of petitioner's argument relative to his right to a trial by jury that we set it forth in full.

> Taylor next claims that even if the court had the authority to summarily sentence him for contempt, a sentence of three and one-half years without the intervention of a jury violates the 6th and 14 Amendments of the Constitution of the United States. Taylor is rather loose in his designation of the sentence imposed which he has tended all through this appeal to designate as three and one-half years. The truth of the matter is, as shown by the record, that Taylor was sentenced on eight separate charges of contempt, six of said sentences

being for six months, one for ninety days, and other (sic) for sixty days. As we total all of them we, of course, come up with three years and five months. However, as far as this court is concerned we will treat them as separate sentences and not as a totality and shall so discuss them.

The Supreme Court has held upon a number of occasions that criminal contempt occupies the same position as any other criminal offense on the question of whether or not the contemnor is constitutionally entitled to a jury trial. If the offense was "petty," with the sentence being not more than six months, a jury trial was not required while if the offense was "serious," with the sentence being in excess of six months, the contemnor was entitled to a jury trial.

In Bloom v. Illinois, 391 U. S. 194, 88 S.Ct. 1477, 20 L.Ed. 2d 522 (1968), the court held that in contempt proceedings where there was no maximum penalty, as we now have held, the seriousness of the offense for the purpose of determining whether or not a jury trial was constitutionally required is determined by the penalty actually imposed.

In Frank v. United States, 395 U. S. 147, 89 S.Ct. 1503, 23 L.Ed. 2d 162 (1969), the court held that sentences for criminal contempt up to six months may be constitutionally imposed without a jury trial, while in Cheff v. Schnackenberg, 384 U.S 373, 86 S.Ct. 1523, 16 L.Ed. 2d 629 (1966), the court ruled that sentences for criminal contempt exceeding six months may not be imposed by federal courts absent a jury trial or a waiver thereof.

As these rules are based upon the consitutional right of a party to a trial by jury, they would apply equally to proceedings in a state court. It might be well to add at this point that there was not before the court in any of the cases cited the question of

what is termed "aggregate sentences" for the purpose of determining the constitutional right to a trial by jury. No sentence meted out upon the charges against Taylor exceeded six months. Therefore, in the light of the cases above cited, Taylor was not constitutionally entitled to a trial by jury, and the sentences were not violative of any of his constitutional rights.

In United States v. Seale, U.S. Court of Appeals, 7th Circuit, 461 F.2d 345 (1972), the court reaffirmed the rule that the 6th Amendment right to trial by jury applied to serious criminal contempts and that in determining whether or not such contempt was "serious" the courts were required to look at the penalty actually imposed. The court then held that for the purpose of determining whether or not a contemnor was entitled to a trial by jury it would be necessary to look to the aggregate of the sentences and not to the sentences separately. In other words, the rule in Seale is such that we must total the penalty imposed by each sentence for the purpose of determining whether or not a contemnor is constitutionally entitled to a trial by jury.

Taylor claims that the rule in Seale is controlling in determining whether or not his criminal contempt was serious and the sentence thus invalid because he was not granted a jury trial. The trial court on its original charges of criminal contempt ordered that the sentences be served consecutively. This court permitted the trial court to later file a corrected judgment reducing the number of acts of criminal contempt charges and amending the sentences imposed.

The corrected judgment does not direct that the sentences, as amended, be served consecutively; therefore, they must be served concurrently. Thus,

the totality of the sentence actually imposed is a jail sentence of six months.

Seale does not apply here, for no matter how we aggregate the sentences we always come up with a total penalty of six months in jail. In Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed 2d 522 (1968), the guidelines established by the Supreme Court predicate the constitutional right to a jury trial upon a determination of the penalty actually imposed.

The penalty actually imposed on Daniel Taylor is six months in jail. He was not entitled to a jury trial. Frank v. United States, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed 2d 162 (1969).

We hold that the sentences imposed on Daniel T. Taylor, III, must be served concurrently; viz.—one six month jail sentence, and except for this holding the judgment of the lower court adjudging him in contempt of court and fixing the penalty for each act of contempt is hereby affirmed.

We are not certain the rule in *Seale* is the best one. See for example: *Commonwealth* v. *Snyder*, Pa., 275 A.2d 312.

Several interesting questions arise from petitioner's and amicus' contentions in this portion of the argument. Although they profess to be speaking for the profession as a whole, and admirably so, it is obvious that they have not considered the ramifications of some of their claims. For example, they claim that at any time a lawyer is sent to jail for criminal contempt the offense should be considered a "serious one" thus entitling a lawyer the right of a trial by jury. *Bloom* v. *Illinois*, supra.

Rule 3.320 of the Court of Appeals of Kentucky provides:

3.320—Procedure Where An Attorney Has Been Convicted of a Misdemeanor or a Felony—When any member of the Association has been convicted of a serious misdemeanor or of a felony a copy of the judgment shall be filed with the Court by the President or Vice-President. If the offense is a felony or if it is a misdemeanor which the Court finds to involve dishonesty or stealing within the concept of **Cotton** v. **Commonwealth, (Ky.)** 454 S.W.2nd 698, the member shall be suspended ipso facto. If no appeal is taken the Court shall enter an order of disbarment. In the event an appeal is taken from such conviction, the final question of discipline shall be deferred until such time as the Court finally determines the matter.

If such appeal results in affirmance of the conviction, then an order of disbarment shall issue forthwith. If the appeal results in reversal, without retrial, then procedures shall be concluded and the suspension shall terminate. If such reversal involves retrial, the suspension shall cease and the matter shall be held in abeyance until such time as the retrial is concluded. If reconvicted, the foregoing procedures shall be as upon the first conviction as hereinabove set out. If not convicted upon such retrial, all proceedings shall cease.

See *Ky. Bar Association* v. *Martin*, Ky., 490 S.W.2d 759. There, Martin, a lawyer, plead guilty to the use of a stolen registration plate of his automobile and an attempt to commit a felony—defrauding of an innkeeper by known inability to pay his bill. Martin received a six-months probated sentence on a plea of guilty after serving 17 days in jail because he was unable to obtain a $1,500 bond as bail.

Martin claimed that he did not know who put the stolen license plate on his car and that he told the innkeeper that the check he gave would not be good until he returned to Louisville. For these offenses, Martin was permanently disbarred.

The first sentence in RCA 3.320 speaks of a serious misdemeanor. Thereafter, the term misdemeanor is qualified by the words involving a dishonest act. In Kentucky, contempts of court are misdemeanors. *Young* v. *Knight*, Ky., 329 S.W.2d 195, 77 A.L.R.2d 994.

The point of all this is that if petitioner's claim succeeds and then a lawyer receives 24 hours in jail for contempt, he may then automatically be subjected to severe disciplinary measures because of the rule as above-stated. Every attorney convicted of a criminal contempt would thereafter be deemed to have been convicted of a serious misdemeanor. Compare *Ky. State Bar Association* v. *McAfee*, Ky., 301 S.W.2d 899, where the Court of Appeals of Kentucky held that the conviction of a lawyer in Federal Court of wilfully and knowingly failing to make income tax returns and who was sentenced to nine months in prison and fined, did not involve such moral turpitude as to be grounds for disbarment. Compare *Ky. State Bar Association* v. *Brown*, Ky., 302 S.W.2d 834, Income Tax Evasions, and *Underwood* v. *Commonwealth*, 38 K.L.R. 32, 105 S.W. 151. In the Underwood case, the county attorney had been convicted three times for bootlegging and the court felt this justified disbarment.

There may be occasions where repeated convictions for contempt may well warrant disciplinary action by an attorney's licensing authority. *Ky. Bar Association* v.

Taylor, Ky., 482 S.W.2d 574. The distinction between proceedings for contempt and those for disbarment is well stated in *Legal Ethics*, Henry S. Drinker, 1953 Columbia University Press, New York, p. 39, where an excerpt from *People ex rel.* v. *Green*, 7 Colo. 237 (1884) is cited.

> The purpose of proceedings for contempt and those for disbarment, and the powers and duties of courts in connection therewith, must not be confused. The former may be termed a police regulation or power, for the protection of the court from present direct interference and annoyance in a trial or proceeding taking place before it; the later is intended to protect, generally, the administration of justice, to save the legal profession from degradation by unworthy membership, and to guard the interest of litigants against injury from those intrusted with their legal business. The power to act in connection with the former is lodged in the court before or against whom the offense is committed; authority to proceed in the latter is possessed exclusively by the tribunal authorized to grant licenses admitting to the profession; the former is punished by fine or imprisonment, and in many instances the proceeding is summary and largely ex parte; the sole penalty in connection with the latter is a prohibition from practicing in courts of record, and this judgment can only be entered upon notice of the charge preferred and a full hearing in defense; ample time for preparation being given and all legitimate testimony being allowed and considered. A contempt may consitute ground for disbarment, but it by no means follows that the cause for disbarment must, in all cases, constitute a contempt.

Hopefully, we will never be held in contempt by any court. We hope the same for all our brothers. If we are, however, we want to have the right to exercise a judgment as to whether we want to do our 30 hours in jail without being confronted with the necessity of taking an appeal or litigating with our licensing authority as to whether or not we can keep our license.

A reasonable delineation has been made by this Court as to what constitutes really a serious offense. If the penalty does not exceed six months, then it is not an offense which requires a jury and is not serious. What is serious and not serious must be determined by this Court and not by anyone else. What may be serious to X might not be to Y and the converse might be true. Conviction of public drunkeness might be considered serious by a preacher but not by the president of a distillery. One standard of seriousness must exist and it must be set by this Court, and this Court has done as stated.

The second interesting question which arises from all of this is the right of a court to modify its judgment. The right of an appellate court to modify a judgment is also involved. What should be an appellate court's right to deal with contempt judgments?

As we argue that if the summary contempt power is abused protection is afforded by the right of appeal and review by appellate courts, then we must accordingly argue that the appellate courts must have the power to modify such sentences. We are aware of the raging controversy surrounding appellate courts' rights to modify, or perhaps to correct would be a better term, sentences imposed by the trial court. Appellate courts in Kentucky have freely availed themselves of this prerogative

in disciplinary procedures when reviewing recommendations from the Bar Association authorities. Compare *Ky. Bar Association* v. *Taylor*, supra, and *In re Viniard*, Ky., 406 S.W.2d 736.

That an appellate court can reduce a sentence which appears unduly harsh in our opinion is no longer open to argument. See *U. S.* v. *McKinney*, 466 F.2d 1403, CA 6, 1972. There the Court of Appeals reduced a draft dodger's sentence from five to one year. This Court did it in *Bartone* v. *United States*, 375 U.S. 52, 11 L.Ed. 2d 11, 84 S.Ct. 21, when it reversed the 5th Circuit judgment denying correction of an enlarged sentence. See also *Bozza* v. *United States*, 330 U.S. 160, 91 L.Ed. 818. In affirming the district judge's correction of a sentence, the court said, "The sentence, as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense." Since this Court's judgment in *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, abolishing the death penalty, state appellate courts all over the country have modified and corrected judgments calling for the death penalty without the necessity of resentencing. See *Caine* v. *Commonwealth*, Ky., 491 S.W.2d 824.

Suppose a police judge is hearing a misdemeanor case. The judge is under the impression that he can impose a 30-day jail sentence when in fact he can only by law impose a 10-day jail sentence. Should he not have the power to correct and modify the erroneous sentence? Suppose the maximum was five months, but the police judge thought it was seven months and imposed seven months. After being made aware of his mistake, he reduced it to five months. Would the defendant

automatically be entitled to a trial by jury because the police judge had originally sentenced him to seven months instead of five months? The answer is obviously no, and at any rate, we believe that the judgment of the Court of Appeals of Kentucky in this respect is the law of the case. (App. 20). See also *In re Channels*, 131 Ky. 737, 100 S.W. 214. Compare *Jackson* v. *Commonwealth*, 187 Ky. 760, 220 S.W. 1045, 9 A.L.R. 955, and *Edge* v. *Commonwealth*, 139 Ky. 252, 129 S.W. 591. An excessive sentence is void only as to the excess. *Dimenza* v. *Johnson*, 131 F.2d 47, CA 9, 1942.

RCr 10.10, which is Kentucky's Rules of Criminal Procedure, provides, "Clerical mistakes in judgments, orders or other parts of the record and errors arising therein, arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." It is obvious that both the respondent and the Court of Appeals of Kentucky complied with this rule in correcting the judgment.

The corrected and modified judgment eliminated the requirement that the sentences be served consecutively. The Court of Appeals of Kentucky construed this to mean that they would be served concurrently and, therefore, came to the conclusion that six months was all that Taylor would be required to serve. It seems to us that if the judgment is silent on the matter and there is no rule requiring the contrary and absent the original statement that they were to be served consecutively, the

only logical conclusion the court could reach was that they are to be served concurrently. RCr 11.04 requires the judgment to state whether the sentences are to be served consecutively or concurrently. Absent the word consecutively and absent the word concurrently, the presumption would seem to be that the sentences are to be served concurrently. This is what the Kentucky court held, and we contend this is now the law of the case and no claim has been made in this court that the judgment is void because of the omission.

CONCLUSION

We think the most critical question in this case relates to the remarks Judge Hayes made at the time he imposed the sentences on Taylor. We have discussed this in some detail in Argument I. The claim raises the question of whether or not the statements made conclusively show a predisposition of hostility by respondent toward the petitioner. If we are correct, as we believe we are, in our premise that Taylor was indeed given the right to be heard and was heard on the contempts, then no further hearing was required before sentence was imposed. The explanation and responses given by Taylor were such as to include all facts argued by amicus which would be advanced in defense or mitigation. The castigation of Taylor by Judge Hayes has no relevance in our opinion to whether or not the offenses were serious ones because that determination must ultimately be made by the guidelines established by this court. The standard is, of course, "the sentence actually to be served." The sentence here ultimately to be served is six months. Therefore, irrespective of how

petitioner or respondent viewed the seriousness of the offenses, this court has already determined that it is not a serious crime. *Bloom* v. *Illinois*, supra.

We compare the remarks of Judge Hayes and those made by District Judge Irving Kaufman at the time he sentenced Julius and Ethel Rosenberg to death. (*The Implosion Conspiracy*, Louis Nizer, Doubleday & Company, Inc., Garden City, New York 1973, pp. 356-357).

> I consider your crime worse than murder. Plain deliberate contemplated murder is dwarfed in magnitude by comparison with the crime you have committed. In committing the act of murder, the criminal kills only his victim. The immediate family is brought to grief and when justice is meted out the chapter is closed. But in your case, I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country.
>
> The evidence indicated quite clearly that Julius Rosenberg was the prime mover in this conspiracy. However, let no mistake be made about the role which his wife, Ethel Rosenberg, played in this conspiracy. Instead of deterring him from pursuing his ignoble cause, she encouraged and assisted the cause. She was a mature woman—almost three years older than her husband and almost seven years older than her younger brother. She was a full-fledged partner in this crime.

Love for their cause dominated their lives—it was even greater than their love for their children.

What I am about to say is not easy for me. I have deliberated for hours, days and nights. I have carefully weighed the evidence. Every nerve, every fiber of my body has been taxed. I am convinced beyond any doubt of your guilt. I have searched the records—I have searched my conscience—to find some reason for mercy—for it is only human to be merciful and it is natural to try to spare lives. I am convinced, however, that I would violate the solemn and sacred trust that the people of this land have placed in my hands were I to show leniency to the defendants Rosenberg.

The sentence of the Court upon Julius and Ethel Rosenberg is, for the crime for which you have been convicted you are hereby sentenced to the punishment of death, and it is ordered upon some day within the week beginning with Monday, May 21st, you shall be executed according to law.

Judge Kaufman's feeling obviously came from what he heard and saw during the trial. He speculated, however, when he said, "Who knows but that millions more of innocent people may pay the price of your treason."

Mr. Nizer further very appropriately observed on page 464:

In the past, doughty lawyers, fighting great causes, have used "open warfare" against the system. Some have denounced the prejudice of the presiding judge or the southern jury sitting in the case. At times these orations stirred the blood with their eloquence and sincerity. But what happened to the client on whose behalf they were made? What

> good did it do him that the lawyer's speech was deemed grandiloquent enough to be included in anthologies, if he hanged or rotted in jail?
>
> In the interest of his client, a lawyer must curb his sense of outrage, swallow his pride if he is humiliated or rebuked by the judge, and even bow to rudeness from his adversary. The only consideration if he strikes back is whether it will advantage his client. Playing to the gallery or to public opinion, which in this case was international, could possible be justified if it was the best way to win. This was not the case. Finerty's bitter comments published in the American and foreign press might gratify the deep feelings of many readers, but it was not in their power to sustain Judge Douglas' stay. He had infuriated the judges before him and given an extra dimension to the unsavory position of the Rosenbergs.

These last quoted two paragraphs sum our feeling about this case more than anything else we have been able to write or argue.

Thus, it is our contention that Judge Hayes could and did impartially pass judgment on Taylor, that Taylor was given a reasonable opportunity for allocution and as the actual sentence to be served is actually six months, Taylor was neither charged nor convicted of a serious offense within the meaning of the Sixth Amendment to the Constitution of the United States. If there was ever any doubt about the necessity of a trial judge retaining the power of summary contempt, the record in this case demonstrates the compelling necessity for this power to be retained.

We disagree that this is a case of great constitutional dimension and import as petitioner and amicus argue. We disagree that any holding made by this court will ever be of much benefit to bench or bar because of the outrageous facts that are present here. Taylor does not come into this case with clean hands. He stands convicted of eight contempts and this court refused to hear Taylor's petition on whether or not his actions were contemptuous. We do not believe any two contempt cases can ever be alike. We can envision cases where the confrontation is totally the lawyer's fault or totally the court's fault or both. Every contempt case must be considered on its particular facts. There can be no general rule in a contempt case. The trial judge must be presumed to be in the best position to deal with contempt both from the point of view of retaining order and providing a deterrent. If he is wrong, he can be reviewed. If the present rules of summary contempt are destroyed, it will subject a trial judge to "open season" by those who claim they have regard for the rights of others but in truth have no feeling for anyone's rights except their own.

Petitioner argues that judges should be made of strong and stern stuff and not be overprotective of their sensitivities. Firm, fair and evenhanded justice, petitioner argues, is all that is necessary to maintain order in a trial. Ordinarily, this is true, but this is not an ordinary case. Eliminating all the impassioned argument, the breast beating, the cries of unfair treatment and hostility, the facts here involve a lawyer who was deliberately contemptuous, whose actions were calculated to disrupt and destroy and to prevent a fair

and orderly trial. Unfortunately for petitioner, he was confronted with a trial judge who was equally determined that this should not happen.

Unfortunately for Taylor, when he commenced his collision course aboard the vessel Disruption, he failed to observe Judge Hayes at the helm of the Leviathan. Taylor is the deliberate begetter of his own predicament.

Taylor has been dealt with fairly and firmly by the courts below. If this court does any damage to the holding below, it will be an invitation for a certain few to escalate their chaos-causing conduct to the extreme detriment and harm of those whom they claim they are trying to serve. Our courts in modern times have been zealous in their efforts to protect the poor, the unpopular, the downtrodden, those who speak for a minority few, those who are oppressed, and those who have been unfairly treated. None of this, however, has any relevance to a lawyer who engages in unconscionable conduct. The point of all this is that lawyers can be zealous and vigorously protect the rights of their clients without being contemptuous and without disrupting the proceedings. The annals of history are replete with instances where lawyers have defended unpopular cases and espoused unpopular causes with dignity and most important, effectively. The famous Henry Clay, a slave owner, once successfully defended his firey cousin, Cassius Clay, one of the nation's leading abolitionists at the time, in front of a proslavery jury and in a proslavery part of Kentucky. So, the argument that conduct like Taylor's is necessary and the elimination of summary contempt power is vital to perpetuate it has no foundation in fact or fiction. It has been our observation that

lawyers who engage in tactics such as Taylor performed here usually secure the maximum punishment from juries for their clients.

The jury system for determining the truth of a controverted fact may not be perfect, but with all the procedural safeguards relative to evidence and trial practice, it has proved to be the most workable and enduring under our system of Anglo-American jurisprudence. There are those who would destroy it, but oddly enough, they have failed to advance a better system.

In every contest there must be some final arbiter or umpire. This is as true in the game of life as in the game of law. This is what happened here.

WHEREFORE, the respondent respectfully demands:

(1) That the judgment of the Court of Appeals of Kentucky be affirmed.

(2) That this court grant all other and proper relief in the premises both legal and equitable as the circumstances warrant.

HENRY A. TRIPLETT
HOGAN, TAYLOR, DENZER
& BENNETT
231 S. Fifth Street, Third Floor
Louisville, Kentucky 40202
Attorneys for Respondent

INDEX

PAGE

Argument. 1–31

I. The Arguments Advanced by the Respondent Demonstrate Most Clearly Why This Court Should Not Only Hold That the Petitioner Was Deprived of Due Process of Law When the Respondent, Who Was Personally Embroiled in Controversy With Him, and Who Did Not Grant Him a Hearing on the Charges, Proceeded Summarily to Find Him Guilty of Criminal Contempt, But That It Should Also Hold That the Imposition of Summary Punishment for Contempt Itself is Violative of Due Process of Law. 1–19

II. The Respondent Has Advanced No Plausible Arguments to Refute the Petitioner's Contention That He Stood Charged With a Serious Offense Within the Meaning of the Sixth Amendment's Guarantee of Trial by Jury or His Contention That Criminal Contempt Should Be Considered a Serious Offense Within the Meaning of the Guarantee Regardless of the Penalty Involved. . 19–28

III. In the Case at Bar This Court Should Authoritatively Define the Constitutitonal Requirements Applicable to the Disposition of Criminal Contempt Cases. 28–31

Conclusion. 31

AUTHORITIES CITED

Cases:

	PAGE
Anderson v. Dunn, 19 U. S. (6 Wheat.) 204 (1821)	18
Argersinger v. Hamlin, 407 U. S. 26 (1972)	26
Bloom v. Illinois, 391 U. S. 194 (1968)	10, 15, 19, 25–26, 31
Codispoti v. Pennsylvania, No. 73-5615, this Term	28
Dairy Queen v. Wood, 369 U. S. 469 (1972)	26
In re Dellinger, 461 F. 2d 389 (7th Cir. 1972)	9
District of Columbia v. Clawans, 300 U. S. 617 (1937)	23
District of Columbia v. Colts, 282 U. S. 63 (1930)	23
Duncan v. Louisiana, 391 U. S. 145 (1968)	26
Dyke v. Taylor Implement Manufacturing Co., 391 U. S. 216 (1968)	27
Edmunds v. Chang, 365 F. Supp. 941 (D. Haw. 1973)	23
Frank v. United States, 395 U. S. 147 (1968)	20, 30
Green v. United States, 365 U. S. 301 (1961)	4
Holt v. Virginia, 381 U. S. 131 (1965)	8, 14
Interstate Commerce Commission v. Brimson, 154 U. S. 447 (1894)	17
Johnson v. Mississippi, 403 U. S. 212 (1971)	9, 14
Kentucky State Bar Association v. Taylor, Ky., 482 S. W. 2d 574 (1972)	11
In re Little, 404 U. S. 553 (1972)	22, 23
Loving v. Virginia, 388 U. S. 1 (1967)	16
Mayberry v. Pennsylvania, 400 U. S. 455 (1971)	9, 14
Offutt v. United States, 348 U. S. 11 (1954)	9, 11, 14
Sacher v. United States, 343 U. S. 1 (1952)	9, 13–14
Shillitani v. United States, 384 U. S. 364 (1966)	18
Ex parte Terry, 128 U. S. 289 (1888)	3, 9, 11
Tumey v. Ohio, 273 U. S. 510 (1927)	12, 14, 15
Ungar v. Sarafite, 379 U. S. 575 (1964)	7
United States v. Meyer, 462 F. 2d 827 (D.C. Cir. 1972)	8, 9

Cases: (Cont'd)

PAGE

United States v. Seale, 461 F. 2d 345 (7th Cir. 1972). 11

Ward v. Village of Monroeville, 409 U. S. 57 (1972). 14–15

Weiss v. Burr, 484 F. 2d 973 (9th Cir. 1973)..... 3

Constitutional Provisions, Statutes and Rules:

U.S. Const. Amend. VI.....19–20, 23, 24–25, 26, 30

U.S. Const. Amend. VII..... 26

Kentucky Revised Statutes 436.020.....18, 27

Kentucky Revised Statutes 421.140..... 27

Federal Rule of Criminal Procedure 42(b)..... 28

Kentucky Court of Appeals Rule 3.320..... 24

Other Authorities:

Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice, *The Judge's Role in Dealing With Trial Disruptions* (1971)..... 3

Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, *Disorder in the Court* (1973).....10–11, 16–17, 17–18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-473

DANIEL T. TAYLOR, III, - - - *Petitioner*

v.

JOHN P. HAYES, JUDGE, Jefferson Circuit Court, Criminal Branch, Second Division, - - - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

The Arguments Advanced by the Respondent Demonstrate Most Clearly Why This Court Should Not Only Hold That the Petitioner Was Deprived of Due Process of Law When the Respondent, Who Was Personally Embroiled in Controversy with Him, and Who Did Not Grant Him a Hearing on the Charges, Proceeded Summarily to Find Him Guilty of Criminal Contempt, But That It Should Also Hold That the Imposition of Summary Punishment for Contempt Itself Is Violative of Due Process of Law.

The arguments advanced by the respondent are heavily larded with invective and consist in no small

part of a vicious *ad hominem* attack on the petitioner's character and integrity, as if to somehow say that the petitioner is a "bad man," so that this Court should decide the case in the respondent's favor regardless of the merits of the petitioner's arguments. While there is a natural human tendency to resist this attack and to respond to these arguments in kind, reducing the case to this level would only serve to divert attention from the significant constitutional issues that the petitioner believes are before this Court. To the extent that the respondent tries to meet the issues on the merits, he appears to be arguing as follows. First, there is no right to be heard at all when a trial judge proceeds summarily to punish for contempt, and since the petitioner was given an opportunity to speak on some occasions *after* he was found guilty of contempt, he has no cause to complain. Secondly, since the respondent did not launch an attack on the petitioner from the beginning of the trial, and since he did not castigate him (to use the respondent's own words) in front of the jury while the trial was going on, he was not disqualified from sitting on the contempt charges irrespective of anything else he said or did that would show bias and hostility. Thirdly, the power of a trial judge to summarily convict and punish for contempts purportedly committed in his presence is constitutional because it has long existed, and it is the only way that a trial judge can prevent disruption by lawyers "of the petitioner's ilk." A careful analysis of the arguments advanced by the respondent, it is respectfully submitted, should demonstrate to the Court not only why it is constitutionally necessary to require a full and

fair hearing when a trial judge proceeds summarily to punish for contempt and not only why the respondent could not impartially sit in judgment on the contempt charges he levelled against the petitioner, but also why the Court should at this time declare that the imposition of summary punishment for contempt itself is violative of due process of law.

In support of his argument that there is no right to be heard at all in summary contempt proceedings, the respondent does little more than quote at length from *Ex parte Terry*, 128 U. S. 289 (1888), as if this language somehow answers the arguments that the petitioner has put forth with respect to the right to a modicum of due process before a person can be convicted of a criminal offense. The language in *Terry*, from which the respondent so copiously quotes, "reflects the spirit of an earlier time, when courts were less sensitive to the compelling nature of procedural due process guarantees." *Weiss* v. *Burr*, 484 F. 2d 973, 986, n. 25 (9th Cir. 1973). In this day and age, "such a proceeding has little to commend it, is inconsistent with the basic notions of fairness and is likely to bring disrespect upon the court." Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice, *The Judge's Role in Dealing with Trial Disruptions*, p. 20 (1971). The petitioner has contended that in light of contemporary standards of due process, a person cannot be sent to prison without being given notice of the charge against him and a meaningful opportunity to be heard in his defense. In this con-

nection, it is also irrelevant that the accuser is at the same time the judge and that he may have witnessed the conduct giving rise to the contempt charge, since if the accused is given a hearing, he may be able to persuade the judge that he perceived the facts inaccurately or that he was mistaken in his view that the conduct in question constituted criminal contempt. See Brief for Petitioner, pp. 36-37. The respondent has been unable to advance an even superficially plausible argument as to why this modicum of due process should be denied to the accused when the trial judge is proceeding summarily.

Nor does the respondent attempt to respond to the petitioner's argument that what due process requires is a *hearing,* in the sense that the trial judge separates the contempt charge from the other matters involved in the trial, states the precise charge and the facts giving rise to that charge, listens objectively and with an open mind to arguments in defense or mitigation and rules on the charge.[1] He merely says that the petitioner "was given a reasonable right to speak *after* he was found to be in contempt." Brief for Respondent, p. 23 (emphasis added).[2] This argument underscores the fact that the petitioner was not given a hearing in

---

[1]The respondent also confuses the petitioner's claim of the right to a hearing with the claim of a right of allocution. Strictly speaking, the right of allocution comes into play only at the time of sentencing, see *Green* v. *United States,* 365 U. S. 301, 304 (1961), and if there was any time when the petitioner most clearly was not given a chance to speak, it was when the respondent was publicly castigating him and reeling off sentences aggregating four and one-half years' imprisonment (App. 28-29).

[2]As is clear from the record, the efficacy of this so-called "right to speak" was dubious at best. There were conferences in chambers following the citation on counts 2 through 5. The respondent

(Continued on following page.)

the present case and shows most clearly why such a

(Continued from preceding page.)

totals the number of pages in the transcript that these conferences ran and implies that they were devoted to a discussion of the contempt charges. Brief for Respondent, pp. 24-25. In fact, as a cursory reading of these pages demonstrate, there was only a discussion about the contempt charges following the citation on counts 2 and 3, and the discussion was so intertwined with substantive matters that the petitioner's response to those charges was lost in the shuffle.

In the discussion that followed the citation on count 4 there was no reference at all to the contempt charge. In the discussion that followed the citation on count 5, or more accurately, in the discussion during which the citation on count 5 occurred, the trial judge ordered the petitioner to submit a list of all of his witnesses within five (later changed to ten and then to fifteen) minutes and then told him that he was in contempt "for your actions in the Court just previous to that." When the petitioner asked whether he could respond for the record, the trial judge said that he had ten minutes to submit the witness list and that, "You can speak to the record all you want to sir." See Brief for Petitioner, pp. 43-45. On count 6 the trial judge simply informed the petitioner that he was in contempt, and when the petitioner asked to respond for the record, the trial judge said he could do so at the next recess. However, this opportunity did not occur. As to count 7, the respondent says that the petitioner was given the right to speak for the record, Brief for Respondent, p. 25, but neglects to point out that the trial judge then directed the court reporter not to put the response in the record. The respondent also says that the petitioner did respond to count 8, Brief for Respondent, p. 25. The record, however, shows the following:

> "The Court: The Court finds Mr. Taylor in contempt of court again.
>
> Mr. Taylor: May I speak to the record, Your Honor?
>
> The Court: No sir. What are you going to ask this witness? (App. 113)."

See Brief for Petitioner, pp. 45-46. The respondent also says that, "In his final argument to the jury, he [petitioner] responded (App. 119)." Brief for Respondent, p. 25. In his closing remarks to the jury, the petitioner, as any experienced lawyer would at the end of a hotly-contested case, stated: "I want to try to close. I want to apologize to the Court if I have been intemperate and state to the Court that it would only have been because of the desire to see justice done and the clear conviction and belief that my client is innocent." (App. 119). It is difficult to see how the petitioner's remarks in his closing argument to the jury has anything remotely to do with a response to the contempt charges.

hearing must be constitutionally-required in summary contempt proceedings. What happened here is that the petitioner was found guilty first—the citation and the finding of guilt occurred simultaneously and no charge was specified—and the response, insofar as one was permitted, was strictly for the record. Due process, it is submitted, prohibits the simultaneous citation and finding of guilt and also requires specification of the charge and the opportunity to respond. There must be some occasion when the trial judge listens to argument with an open mind, thinks about what he is doing, and then decides whether the person he has cited was really guilty of criminal contempt. The sequence should be citation for contempt, specification of the charge, opportunity to respond and judgment, rather than as here, the simultaneous citation and finding of guilt. If there is a due process right to a *hearing* in summary contempt proceedings, that right was clearly denied to the petitioner here, and the present case shows beyond a doubt why this modicum of due process must be constitutionally-required.

In arguing that he could impartially sit in judgment on the multiple contempt charges that he levelled against the petitioner, the respondent does not dispute, as he cannot, that he said and did the things attributed to him by the petitioner. He accuses the petitioner of using "unfair and incomplete quotes from the transcript," Brief for Respondent, p. 15, but he does not specify how or why these quotes are "unfair and incomplete," nor does he attempt to "complete" them in

such a way as to show that they do not demonstrate his bias and hostility toward the petitioner. He also argues that the fact that he rescinded the first contempt charge (ignoring the fact that he included it at the end of the trial when sentencing the petitioner to four and one-half years' imprisonment and only subsequently rescinded it in his "corrected judgment") conclusively refutes the charge of bias and hostility *regardless of everything else that occurred subsequently.* Likewise, he says that his admitted "castigation" of the petitioner at the time he imposed sentence is "totally irrelevant to the claim of bias or hostility." Brief for Respondent, p. 17. However, he neglects to explain either why his rescinding the first contempt charge conclusively shows that he was not biased and hostile toward the petitioner or why his "castigation" at the time of sentencing is "totally irrelevant" to the claim. And in an utterly incredible statement, he says in reference to *Ungar* v. *Sarafite,* 379 U. S. 575 (1964), that, "If the words 'you are not only contemptuous but disorderly and insolent' made during the trial by the judge are not sufficient to disqualify, then nothing that Judge Hayes said to Taylor during the trial of this case comes close." Brief for Respondent, p. 17. Some of the more egregious statements made here by the respondent to the petitioner during the course of the trial are set forth in the Brief for Petitioner, pp. 59-62, and they make the statements of the judge in *Ungar* sound like words of praise.

It is not, of course, possible to ignore the respondent's tirade from the bench and his "castigation" of

the petitioner at the time of sentencing. It is also not possible to ignore his *behavior* during and after the trial, such as his requiring the petitioner to produce a list of all his prospective witnesses within fifteen minutes and summarily ruling that a number of them would not be permitted to testify, his invalid order prohibiting the petitioner from the practice of law in "his court," or his refusal to admit the petitioner to bail or to even hold a bail hearing until ordered to do so by the Court of Appeals. It is also not possible to ignore the fact that it was necessary for the petitioner, in order to properly defend the rights of his client, to accuse the respondent of denying his client's right to a public trial,[3] and of acting on the basis of rancor in ruling that race was not an issue in the case, and the fact that the respondent accused the petitioner of inferring that he, the respondent, had "rigged the jury." See *e.g., Holt* v. *Virginia,* 381 U. S. 131 (1965). Nor is it possible to ignore the fact, as the respondent proudly asserts,[4] and as the Court of Appeals found (App. 11), that he had "adopted an adversary picture with respect to the alleged contemnor." *United States* v. *Meyer,* 462 F. 2d 827, 862 (D.C. Cir. 1972). But even if it were possible to ignore all of this, *the statements made by the respondent during the course of*

---

[3]That accusation, which included a charge of racial discrimination, was the basis for part of the citation for contempt on count 5. (App. 25).

[4]"Unfortunately for Taylor, when he commenced his collision course aboard the vessel Disruption, he failed to observe Judge Hayes at the helm of the Leviathan. Taylor is the deliberate begetter of his own predicament." Brief for Respondent, p. 48.

the trial alone demonstrate his hostility and bias toward the petitioner beyond peradventure.

Finally, the respondent quotes at length from *Sacher* v. *United States,* 343 U. S. 1 (1952), and argues that, "Comparing the record here with the record in *Sacher* is like comparing Heaven and Hell." Brief for Respondent, p. 21. Apparently he is trying to argue that if the trial judge in *Sacher* was not disqualified from sitting in judgment on the contempt charges, then he should not be found to have been disqualified here either. Reliance on *Sacher* to support a claim of judicial impartiality has about the same efficacy today as relying on *Ex parte Terry, supra,* to define contemporary standards of due process of law. The disqualification aspect of *Sacher* (which involved only the question of disqualification in the face of a personal attack by the alleged contemnor on the judge) has been completely eroded away by numerous subsequent decisions of this Court. See the discussions in *United States* v. *Meyer, supra,* at pp. 831-845, and *In re Dellinger,* 461 F. 2d 389, 392-395 (7th Cir. 1972). In effect, by relying on *Sacher,* the respondent is asking this Court to overrule *Offutt* v. *United States,* 348 U. S. 11 (1954); *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971); *Johnson* v. *Mississippi,* 403 U. S. 212 (1971), and cases of similar import or to limit them to their precise facts. What this Court did in these cases, however, was not merely to rule on a challenge to a judge's lack of impartiality in a particular case, but to establish the principle that as a matter of due process a judge cannot sit in judgment on contempt

charges in any case where for any reason he has become "personally embroiled in controversy" with the alleged contemnor. If, on the facts of this case, it can be said that the respondent was not "personally embroiled in controversy" with the petitioner, the concept of "personally embroiled in controversy" will have no meaning whatsoever. By no stretch of the imagination did the petitioner have that trial before an unbiased judge, which is essential to due process of law. *Bloom* v. *Illinois*, 391 U. S. 194, 205 (1968).

The petitioner has further argued that this Court should now consider whether the exercise of the summary contempt power itself is violative of due process of law. If it is recognized that due process requires that the accused be given a hearing notwithstanding that the alleged contempts were committed in the presence of the trial judge, it is but a short step to holding that there can be no justification at all for a judge proceeding summarily to convict and punish a person for criminal contempt. If this Court were to so hold, it would no longer be necessary to determine in every case whether the particular judge was "personally embroiled in controversy" with the accused. More importantly such a holding would abolish this "anomaly in the law" once and for all and would end the only situation in which the otherwise inconsistent functions of prosecutor, judge and jury are combined in a single individual who is necessarily involved in the events leading up to the charge. In the process the pattern of appellate reversals of summary contempt convictions, see *Disorder in the Court* 233-234 (1973), would

also come to an end. And most importantly, in this area of the law, justice would now "satisfy the appearance of justice." *Offutt* v. *United States, supra,* at p. 14.

In arguing for the retention of the summary contempt power, the respondent does little more than say that the exercise of this power must be constitutional because it has existed for so long and continue the *ad hominem* attack against the petitioner that has permeated his entire brief, saying that, "The power of summary contempt must exist because of the petitioner and those like him." Brief for Respondent, p. 33.[5] It is tempting to reply that, "The summary contempt power cannot exist because of the respondent and those judges like him," but such an argument would fall wide of the mark. Although the facts present here do demonstrate most cogently, as this Court has long-recognized, that the exercise of the summary contempt power is "arbitrary in its nature and liable to abuse," *Ex parte Terry, supra,* at p. 313, the ques-

[5]The respondent also refers to the fact that the petitioner received a six month suspension for overstepping the bounds of permissible advocacy in another hotly-contested murder case where again, as the Court of Appeals recognized, the petitioner was confronted with an intemperate and hostile judge. *Kentucky State Bar Association* v. *Taylor,* Ky., 482 S. W. 2d 574 (1972). In that case the Court observed: "Whatever may be the judge's conduct, the remedy lies somewhere else, and if both court and counsel misbehave the damage to the profession and to the image of justice in the public eye is doubled." 482 S. W. 2d at 574. Improper conduct by the trial judge likewise is said not to be a substantive defense to a charge of criminal contempt. See *e. g., United States* v. *Seale,* 461 F. 2d 345, 362-363 (7th Cir. 1972). There is something fundamentally unfair in subjecting the lawyer to disciplinary action and punishment for contempt as a result of his improper conduct while the trial judge can do as he wishes with impunity.

tion of the constitutionality of the summary contempt power obviously involves considerations going far beyond the facts of this case and the participants involved.

In this connection the petitioner would submit that the facts of this case—egregious as they may be—should be disregarded and that the qutstion of the constitutionality of the summary contempt power itself should be approached on the assumption that it will be exercised by an able and fair-minded judge who has not become "personally embroiled in controversy" with the alleged contemnor. It is the petitioner's contention that no matter how able and fair-minded a particular judge may be, the exercise of the summary contempt power by *any* judge is violative of due process of law. This is so for two fundamental—and incontrovertible—reasons. In the first place, in exercising the summary contempt power, the judge necessarily performs the inconsistent functions of prosecutor, judge and jury, and this is most clearly the situation "in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927). At the same time as he is making a "decision to prosecute," the judge is acting as a jury in finding the facts and acting as a judge in determining whether those facts constitute criminal contempt. It is obviously impossible for a single individual to compartmentalize his

mind in this manner, and the judge cannot stop "thinking like a prosecutor" at the same time as he is performing the functions of judge and jury as well. In this country, a criminal proceeding is prosecutory and adversary, and the prosecutor, the judge and the jury, along with defense counsel, have distinct functions to play, all of which relate to protecting the accused's right to a fair trial. The inconsistent combination of these functions in a single person, therefore, is inherently a denial of due process of law.

Secondly, the trial judge is necessarily involved in the events leading up to the contempt charge and no matter how hard he may try, he cannot divorce his position as "the Court" against whom the purported contempt was committed from his position as the trier and the judge of the contempt charge. This point was recognized by Justice Jackson in *Sacher* v. *United States, supra,* when he wrote for the majority:

> "It is almost inevitable that any contempt of court committed in the presence of the judge during the trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other." 343 U. S. at 12.

The approach of the Court in *Sacher,* however, was to reject disqualification of the judge as a defense to summary contempt proceedings, at least where the basis

of the disqualification was a personal attack on the judge by the accused. To this extent the approach in *Sacher*, is, of course, effectively overruled by *Mayberry* v. *Pennsylvania, supra*, and the *Sacher* approach never had been followed where the judge was an "activist seeking combat," *Offutt* v. *United States, supra*, or had been charged with improper conduct by the alleged contemnor. *Holt* v. *Virginia, supra; Johnson* v. *Mississippi, supra.*

While this Court has now recognized that there can be judicial disqualification in particular cases, it has never considered whether the rationale of *Sacher*—that any contempt of court committed in the presence of the judge will be treated as an offense against him personally—is still valid. It is respectfully submitted, for the reasons previously stated, that the rationale of *Sacher* is indeed valid, and thus that the exercise of the summary contempt power itself is violative of due process of law.

In this regard it may be fruitful to compare this Court's decision in *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972), with its decision in *Tumey* v. *Ohio*, 273 U. S. 510 (1927). In *Tumey* the Court found trial before the mayor violative of due process of law because he personally received income from the fees and costs levied by him against alleged violators. The mayor in *Tumey* may be likened to the judge "personally embroiled in controversy" with the alleged contemnor, since he has a personal stake in finding the accused guilty of contempt. In *Ward* the mayor did

not share in the fees and costs. This Court found the lack of personal interest irrelevant insofar as the denial of due process was concerned, stating:

> "The fact that the mayor there [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle . . . [t]he test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused'. . . . Plainly that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contributions from the mayor's court." 409 U. S. at 60.

By the same token the fact that the judge is charged with maintaining order in the court over which he presides offers a "possible temptation not to hold the balance, nice, clear and true between the [court] and the accused," *particularly when he is also acting simultaneously as prosecutor, jury, and judge.* If it was a denial of due process for the mayor to adjudicate the guilt of traffic offenders in *Ward,* it is clearly a denial of due process for a judge before whom an alleged contempt has been committed to adjudicate the guilt of the accused in a summary proceeding. In short, trial by the judge before whom an alleged contempt has been committed is inherently a denial of the right to trial before an unbiased judge, *Bloom* v. *Illinois, supra,* and thus violative of due process of law.

Insofar as the respondent attempts to proffer any justification for the exercise of the summary contempt power—other than its durability—it is the familiar shibboleth of "preserving order." In this vein the respondent argues that, "If the present rules of summary contempt are destroyed, it will subject a trial judge to 'open season' by those who claim they have regard for the rights of others but in truth have no feeling for anyone's rights except their own." Brief for Respondent, p. 47. The question is thus squarely presented: should this Court sanction the continuation of what would otherwise be considered an inherent denial of due process of law on the ground that it is necessary to "preserve order?" To answer that question, the petitioner would propose drawing an analogy to the compelling state interest test that this Court has employed in other areas, see *e.g., Loving* v. *Virginia*, 388 U. S. 1 (1967), and would posit the issue as follows: is there a compelling state interest in "preserving order in the courtroom" that cannot be achieved by means other than the exercise of the summary contempt power, so that the exercise of the summary contempt power is constitutional despite the inherent unfairness to the accused that results?

In the first place, it is submitted that there would be a compelling state interest in "preserving order in the courtroom" only if it were demonstrated that American society is faced with a serious problem of disruption in judicial proceedings. All the empirical evidence is to the contrary. See *Disorder in the Court*,

pp. 6-9.[6] More importantly perhaps, to the extent that any problem of disruption does exist and to the extent that it is necessary to "preserve order" in the courtroom, this objective can be accomplished by "less drastic means" than the exercise of the summary contempt power with all of its inherent unfairness. Any need to "preserve order" can be accomplished by the trial judge's *citing* the offending lawyer or party for contempt, and the deterrent effect of a conviction for criminal contempt will be no less because the determination of guilt and punishment will occur in another proceeding and in accordance with the requirements of due process of law.[7] See the discussion in *Disorder in the*

---

[6]That the absence of disruption is not due to the fact that judges now possess the summary contempt power is demonstrated by the fact that there is no discernible problem of disruption in administrative proceedings, even though administrative agencies have long been denied the summary contempt power. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894). Disruption is not a serious problem because lawyers and litigants recognize that it is in their best interests that proceedings be orderly. Even the respondent admits that disruption is not a serious problem and that the absence of disruption is not due to the existence of the summary contempt power. As the respondent states: "With the exception of a minute number of those licensed to practice law, no deterrent is necessary. All but a very few, we are proud to say, do everything possible to maintain the high standards of the profession. It is not fear of punishment or sanction that prevents the average lawyer from becoming obstreperous and contemptuous but it is an affirmative regard for the rights of others and the high privileges lawyers have." Brief for Respondent, p. 32.

[7]It is interesting to note that in the case at bar any supposed deterrent effect that could have resulted from the respondent's proceeding summarily to simultaneously cite the petitioner for contempt and find him guilty of the charge was minimized because the respondent did not impose sentence at the time he acted. Although the petitioner stood convicted of eight contempts, he had no idea that he would receive a sentence of four and one-half years' imprisonment. So far as he knew, the sentence would have had to

(Continued on following page.)

Court, 131-132. This Court has clearly recognized the applicability of the "less drastic means" test to the exercise of any form of judicial power—it is a long established principle that a court must exercise "the least possible power adequate to the end proposed," *Anderson* v. *Dunn,* 19 U. S. (6 Wheat.) 204, 231 (1821)—and in particular to the exercise of the contempt power. See *Shillitani* v. *United States,* 384 U. S. 364 (1966). Since courtroom disorder can adequately be prevented by the "less drastic means" of citing the alleged offender for criminal contempt, there is no compelling necessity to permit trial judges to exercise the

---

(Continued from preceding page.)

have been limited to a maximum of 30 hours in jail and $30 on each of the counts, since at that time Ky. Rev. Stat. 436.020, limiting the power of the judge to impose greater sentences without the intervention of a jury, had not yet been declared invalid by the Court of Appeals. Instead the respondent, without giving the petitioner a chance to speak a word in defense or mitigation, and denying him the right of allocution at the one time in the case that the right of allocution as such was proper, reeled off sentences aggregating four and one-half years' imprisonment. Even if the statute was not in effect, the petitioner had no way of knowing what the sentence would be and could have been no more "deterred" than he would have been if he had merely been cited for contempt.

In the exceedingly rare case where a lawyer will have embarked on a course of persistent obstruction—which the petitioner earnestly contends, and as the record shows, did not happen here—it is doubtful if punishment for contempt, whether imposed on the spot or threatened subsequently, will make any difference. Moreover, the conduct of the lawyer will have invariably prejudiced his client in the eyes of the jury, thereby necessitating that the court declare a mistrial. See Brief of the Louisville Bar Association as Amicus Curiae, pp. 32-33. It is also interesting to note that the respondent states, "Antics such as Taylor performed here must have prejudiced his client." Brief for Respondent, p. 31. If this is so, why, may it be asked, *did the respondent not declare a mistrial?* The conclusion is inescapable that the petitioner's so-called "antics"—which the petitioner insists the respondent has confused with vigorous and innovative advocacy—did not prejudice his client in any way, else the respondent would have declared a mistrial.

summary contempt power and to sanction the inherent denial of due process that results from that exercise.

It must be emphasized that no challenge is made to the constitutionality of the substantive offense of criminal contempt. The challenge is only to the summary conviction and punishment for the offense by the judge who is necessarily involved in the events leading up to the contempt charge and who in proceeding summarily is performing the inconsistent functions of prosecutor, jury and judge. All that the petitioner asks is that a person charged with criminal contempt, "a crime in the ordinary sense, *Bloom* v. *Illinois, supra,* at p. 201, be given those same "institutionalized procedures which have been worked out over the centuries," *Id.* at 208, that are given to every other criminal defendant no matter how serious or how petty his crime. This Court should now so hold.

II.

The Respondent Has Advanced No Plausible Arguments to Refute the Petitioner's Contention That He Stood Charged With a Serious Offense Within the Meaning of the Sixth Amendment's Guarantee of Trial by Jury or His Contention That Criminal Contempt Should Be Considered a Serious Offense Within the Meaning of the Guarantee Regardless of the Penalty Involved.

The petitioner has argued that even though the actual sentence imposed for criminal contempt, including by retroactive amendment if necessary, does not exceed six months, there is still the right to a trial by jury if other objective criteria show that he was charged

with a serious offense within the meaning of the Sixth Amendment's guarantee. He has also argued that this Court should now consider whether criminal contempt must be treated as a serious offense within the meaning of the trial by jury guarantee because of the nature of the offense itself without regard to the penalty involved. With respect to the petitioner's first argument the respondent merely replies that this Court has imposed a "six month rule" in all cases of criminal contempt and that since appellate courts have the power to modify sentences, it does not matter if the petitioner's sentence was modified retroactively to bring it within a purported "six month rule." The petitioner has demonstrated at length that this Court has not imposed a "six month rule," Brief for Petitioner, pp. 19-23, and the respondent has made no effort to respond to this argument. It must be emphasized that while this Court *said* in *Frank* v. *United States,* 395 U. S. 147, 149 (1968), that where no maximum punishment for criminal contempt is authorized, "The severity of the penalty actually imposed is the best indication of the seriousness of the particular offense," it has not held that the severity of the penalty actually imposed is the only indication of seriousness, and it emphasized in *Frank* that it was looking for "objective indications of the seriousness with which society regards an offense." 395 U. S. at 148. It definitely has not held that so long as the penalty actually imposed, including by retroactive amendment if necessary, does not exceed six months, there is no right to a jury trial regardless of other objective indications showing that *par-*

ticular charges of criminal contempt in particular circumstances involved a "serious offense" within the meaning of the trial by jury guarantee.

In the case at bar these "other objective indications" were clearly present. See Brief for Petitioner, pp. 24-26. The respondent does not deal with these arguments except to say that the seriousness with which he viewed the offense is irrelevant so long as the sentence actually imposed does not exceed six months. Brief for Respondent, pp. 43-44. In addition, the respondent makes much of the fact that an appellate court has the power to modify sentences. This the petitioner does not dispute. What the petitioner contends in this respect is simply that if the sentence actually imposed is indeed "the best indication of the seriousness of the particular offense," the modification of the sentence by the appellate court to bring it within a purported "six month rule," does not convert what would be an otherwise serious offense under this standard to a "petty offense" so as to deprive the accused of his right to trial by jury. At least this should be so, where as here, the sentence is *not* reduced on the ground that the accused was not guilty of "serious" conduct.

What stands out most clearly from the appellate court's modification of the sentence and its order that the sentences on the separate counts must run concurrently is that at the same time as it was holding that the petitioner had only been convicted of a "petty" offense within the meaning of the trial by jury guarantee, it attacked the petitioner's character and conduct in the most opprobrious terms and accused him

of the most serious conduct of which a lawyer can be accused—embarking on a deliberate plan to disrupt the trial and thwart the administration of justice. This characterization is revelant, of course, only to show the serious nature of the charge against the petitioner. If it were proper to do so in the context of this case, petitioner would most vigorously dispute this characterization of his character and conduct, demonstrate that it is totally unsupported by the record and show that what he was doing was to zealously defendant to the best of his ability his client charged with a capital offense. He would also strenuously contend that none of the charges for which he was convicted could constitutionally support a conviction for criminal contempt. *In re Little,* 404 U. S. 553 (1972). But as the respondent seemingly fails to realize, the substantive guilt or innocence of the petitioner is not in issue before this Court. It is precisely because the conduct of the petitioner was characterized in this way by the respondent and by the Court of Appeals—regardless of whether the characterization is remotely supported by the record—that the petitioner stood *charged* with a serious offense within the meaning of the trial by jury guarantee. Unless this Court is prepared to hold that there can *never* be a right to trial by jury in cases of criminal contempt where the penalty actually imposed, including by retroactive amendment if necessary, does not exceed six months, there can be no doubt that in the circumstances of this case, the petitioner was charged with a serious offense and was entitled to have his guilt or innocence determined by a jury.

The petitioner has further contended that this Court should now hold that criminal contempt is a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee because the nature of the offense—which requires a material obstruction to the administration of justice, *In re Little, supra,*—is likely to be regarded as contrary to the "social and ethical judgments of the community," *District of Columbia* v. *Clawans,* 300 U. S. 617, 628 (1937), in a society in which the fair and orderly administration of justice is held in high regard. This being so, it is the nature of the offense rather than the penalty authorized or imposed that should be determinative of the right to a jury trial. *District of Columbia* v. *Colts,* 282 U. S. 63 (1930).

In this connection the petitioner has noted that the seriousness of a charge of criminal contempt against an attorney is magnified because of the collateral consequences, such as disciplinary action or injury to a lawyer's professional reputation and his "balance of harmony with the courts" that may result from a contempt conviction. See the discussion in *Edmunds* v. *Chang,* 365 F. Supp. 941, 944 (D. Haw. 1973). He has not suggested, however, that there should be a different rule for attorneys and non-attorneys with respect to entitlement to a jury trial for contempt, only that because so many contempt cases do involve attorneys, the collateral consequences to an attorney arising from a contempt conviction should be taken into account in determining whether criminal contempt is by its very nature a serious offense within the meaning of the trial by jury guarantee.

The respondent's reply to this argument focuses entirely on the collateral consequences to an attorney, and what the respondent appears to be arguing is that criminal contempt is not a serious offense within the meaning of the trial by jury guarantee, because in Kentucky an attorney is not *automatically disbarred* upon conviction for criminal contempt. It is difficult to see how the fact that criminal contempt is not a "serious misdemeanor involving dishonesty or stealing" within the meaning of Kentucky Court of Appeals Rule 3.320 has anything remotely to do with the question of whether it is a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee. While a conviction for criminal contempt does not automatically result in disbarment, in Kentucky and elsewhere, an attorney convicted of criminal contempt may well face some degree of professional discipline, and more importantly perhaps, his reputation and ability to function as a lawyer may be adversely affected by the conviction.[8] Apart from his clearly misplaced

---

[8]The respondent concludes his Brief by emphasizing the importance of the trial by jury guarantee, stating:

> "The jury system for determining the truth of a controverted fact may not be perfect, but with all the procedural safeguards relative to evidence and trial practice, it has proved to be the most workable and enduring under our system of Anglo-American jurisprudence. There are those who would destroy it, but oddly enough, they have failed to advance a better system." Brief for Respondent, p. 49.

The petitioner would endorse these sentiments fully, and would contend that for precisely these reasons the right to trial by jury should extend to all cases of criminal contempt. It is rather incongruous, however, for the respondent to praise the jury system so highly, while at the same time argue that the jury system is not the proper vehicle for determining guilt or innocence in the case of criminal contempt.

argument as to the significance of the collateral consequences that may result to an attorney from his conviction for criminal contempt, the respondent makes no real effort to reply to the argument that criminal contempt, because of the nature of the offense itself, is a serious offense within the meaning of the Sixth Amendment's trial by jury guarantee.

The question of the right to trial by jury in cases of criminal contempt cannot be fully divorced from the question of the "institutional bias" that necessarily exists when a *judge* is called upon to determine whether an accused is guilty of contempt of *court*. Even though the judge is not the one before whom the alleged contempt was committed, the nature of the offense necessarily involves a confrontation between the accused and the court, and the "institutional bias" in favor of the brother judge and against the accused can never be absent. Stated simply, a *court*, through the person of a *judge*, should not sit in judgment on contempts of court, and the inherent "institutional bias" that exists in such a situation can be obviated by holding that the right to trial by jury extends to all cases of criminal contempt. This principle was seemingly recognized in *Bloom* v. *Illinois*, 391 U. S. 194, 202 (1968), where this Court observed:

> "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's

> temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court."

If the Sixth Amendment's guarantee of trial by jury truly does reflect a "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges," *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968), there is no case more appropriate for the invocation of that guarantee than a prosecution for criminal contempt. This Court should now so hold.

The petitioner has further argued that this Court should now also consider whether there is the right to trial by jury any time an accused faces the possibility of a period of imprisonment as punishment for a crime, as it has held with respect to the right to the assistance of counsel. *Argersinger* v. *Hamlin*, 407 U. S. 26 (1972).[9] See Brief for Petitioner, pp. 33-34. Even if the Court is not willing to go this far, it should hold that any time the accused faces the possibility of "substantial imprisonment," *i.e.*, imprisonment beyond a

---

[9]In *Argersinger* the Court distinguished the right to trial by jury from the right to the assistance of counsel only on the ground that there was "historical support" for limiting the right to trial by jury to "serious cases." 407 U. S. at 30. But just as this Court has disregarded the historical practice in determining the applicability of the Seventh Amendment's right to trial by jury guarantee in civil cases where damages are sought, *Dairy Queen* v. *Wood*, 369 U. S. 469 (1962), it should not allow the historical practice to determine the applicability of the Sixth Amendment's right to trial by jury guarantee in criminal cases where the accused faces a possible loss of his liberty through imprisonment.

brief period of time, the right to trial by jury should attach.[10]

However, the petitioner fully recognizes that since this case involves the question of the right to trial by jury in cases of criminal contempt, the Court may not wish to formulate a rule governing the right to trial by jury in other cases. The petitioner has argued that criminal contempt is because of the nature of the offense itself a serious offense within the meaning of the trial by jury guarantee. If the Court is not willing to accept this contention fully, it should at least recognize that criminal contempt is a serious offense in many situations, and should hold that the right to trial by jury attaches in criminal contempt cases whenever the accused faces the possibility of "substantial imprisonment." Under such an approach the contours of "substantial imprisonment" may be defined by this Court's decision in *Dyke* v. *Taylor Implement Manufacturing Co.*, 391 U. S. 216 (1968), where it held that a sentence of ten days' imprisonment was not "substantial" so as to bring into play the accused's right to trial by jury.

If the Court adopts this approach to the right to trial by jury guarantee in criminal contempt cases and if it also holds that criminal contempt may not be proceeded against summarily, the process of adjudication of criminal contempt would operate as follows. When the alleged contempt was committed in the presence of the trial judge, he would cite the party for

---

[10]This was the approach in Kentucky to imprisonment for criminal contempt under Ky. Rev. Stat. 421.140 and 436.020 until these statutes were invalidated by the Court of Appeals. In non-contempt cases the right to trial by jury exists without regard to any possible punishment. See Brief for Petitioner, pp. 26-28.

criminal contempt. The case would subsequently be tried before another judge presumably under a procedure similar to that set forth in Federal Rule of Criminal Procedure 42(b). If the trial judge believed that the alleged contempt was of a sufficiently serious nature to merit punishment upon conviction of "substantial imprisonment" (let us assume for these purposes that "substantial imprisonment" means imprisonment in excess of ten days), he would so certify, and the case would be tried before a jury. If he did not so certify, it would be tried to the Court.[11]

The petitioner asks this Court to hold that the right to trial by jury is required in all cases of criminal contempt, but if it is not willing to go this far, it should at least hold that the right to trial by jury is required when the accused faces the possibility of "substantial imprisonment."

III.

In the Case at Bar This Court Should Authoritatively Define the Constitutional Requirements Applicable to the Disposition of Criminal Contempt Cases.

The nature of the grant of certiorari in the case at bar, coupled with the grant of certiorari in *Codispoti* v. *Pennsylvania*, No. 73-5615, this Term, indicates that this Court is now giving plenary consideration to the constitutional requirements applicable to the disposition of criminal contempt cases. The respondent dis-

[11] If multiple contempts were involved, the question of whether the proposed sentences had to be aggregated for jury trial purposes would be determined by this Court's decision in *Codispoti* v. *Pennsylvania*, No. 73-5615, this Term.

agrees that this is a case of "great constitutional dimension and import," and argues that the present rules of summary contempt (as he perceives them) should be "immutable." He asks this Court to decide the case only with reference to the "outrageous facts that are present here." Brief for Respondent, p. 47. The petitioner agrees that the facts are indeed "outrageous," but for totally different reasons than those perceived by the respondent. On the facts of this case, petitioner contends that he was clearly denied the right to trial before an unbiased judge, that he was not given a hearing satisfying the minimal requirements of due process of law, and that he stood charged with a serious contempt entitling him to the right to trial by jury instead of trial before his accuser.

The petitioner does not believe, however, that this Court has granted certiorari in this case to decide whether the petitioner or the respondent was "in the right." The issues presented here have great significance for lawyers and judges everywhere and for the administration of justice itself. The need for this Court to authoritatively define the constitutional requirements applicable to the disposition of criminal contempt cases stems from the fact that this is the only area of the criminal law where punishment can be imposed summarily and where the inconsistent functions of prosecutor, jury and judge are combined in the same individual who is necessarily involved in the events leading up to the charge. Moreover, the matter of entitlement to a jury trial in this area is extremely uncertain because in determining the question, this

Court has given great weight to the sentence actually imposed while at the same time looking for "objective indications of the seriousness with which society regards an offense." See *Frank* v. *United States, supra.* The necessity for this Court to set forth the constitutionally-permissible procedures to be followed in criminal contempt cases is abundantly clear.

The petitioner asks this Court to hold first that the exercise of the summary contempt power is itself violative of due process of law and secondly that criminal contempt is a serious offense within the meaning of the Sixth Amendment's guarantee of trial by jury irrespective of the penalty that is authorized or imposed. If the Court were to so hold, the result would be that all criminal contempt proceedings would be presided over by a judge other than the one before whom the purported contempt was committed, and there would be the right to trial by jury in all criminal contempt cases. If, however, the Court is unwilling to give the summary contempt power a long-deserved burial, it should at least hold that an accused contemnor is entitled as a matter of due process to a full and fair hearing on the charge before he is found guilty and sentence is imposed, and should set clear standards relating to disqualification of the trial judge so that no appellate court could hold, as the Kentucky Court of Appeals did here, that a trial judge so "personally embroiled in controversy" as was the present respondent could sit in judgment on the charge. So too, if it is unwilling to hold that the right to trial by jury applies to all cases of criminal contempt or to all

cases where the possibility of any imprisonment is involved, it should at least hold that the right to trial by jury extends to any case of criminal contempt where the accused faces the possibility of "substantial imprisonment."

In the final analysis, it is respectfully submitted that the position for which the petitioner is contending in this case is the position most in accord with "those institutionalized procedures which have been worked out over the centuries," *Bloom* v. *Illinois,* 391 U. S. 194, 208 (1968), and should commend itself to this Court.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, the judgment of the Court of Appeals of Kentucky should be reversed and the conviction of the petitioner for criminal contempt should be set aside.

Respectfully submitted,

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

DORIS PETERSON
MORTON STAVIS
Center for Constitutional Rights
853 Broadway
New York, New York 10003

Attorneys for Petitioner

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TAYLOR *v.* HAYES, JUDGE

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 73-473. Argued March 18, 1974—Decided June 26, 1974

During a Kentucky murder trial in which petitioner was counsel for the accused, respondent trial judge informed petitioner on nine different occasions that he was in contempt of court. At the conclusion of the trial, respondent, in the jury's presence, made a statement concerning petitioner's trial conduct, and, refusing petitioner's request to respond, imposed consecutive sentences on nine counts of contempt aggregating four and one-half years' imprisonment, including sentences of one year's imprisonment on each of two counts. Subsequently, respondent amended the judgment to eliminate the first contempt charge and to reduce each of the latter sentences to six months' imprisonment, but was silent on whether all of the sentences were to run concurrently or consecutively. The Kentucky Court of Appeals affirmed, but ruled that, because the amended judgment did not direct that the sentences be served consecutively, they had to be served concurrently, thereby making the penalty actually imposed six months in jail and rendering constitutionally permissible the conviction and sentence without a jury trial. *Held:*

1. Since no more than a six-month sentence was actually imposed, the eight contempts, whether considered singly or collectively, constituted petty offenses and hence trial by jury was not required. It is not improper to permit the State, as in this instance, after conviction, to reduce a sentence to six months or less rather than retry the contempt with a jury, since "criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved." *Bloom* v. *Illinois*, 391 U. S. 194, 211. Pp. 6-8.

2. Respondent's conduct, in proceeding summarily after trial to punish petitioner for alleged contempt committed during the trial without giving him an opportunity to be heard in defense or miti-

Syllabus

gation before he was finally adjudged guilty and sentence was imposed, does not square with the Due Process Clause of the Fourteenth Amendment. *Groppi* v. *Leslie*, 404 U. S. 496. Reasonable notice of the specific charges and opportunity to be heard are essential in view of the heightened potential for abuse posed by the contempt power. Pp. 8–12.

3. Because it appears from the record that "marked personal feelings were present on both sides" and that marks of "unseemly conduct [had] left personal stings," *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 464, another judge should have been substituted for respondent for the purpose of finally disposing of the contempt charges. Pp. 12–15.

494 S. W. 2d 737, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, and POWELL, JJ., and in Parts II and III of which DOUGLAS and MARSHALL, JJ., joined. MARSHALL, J., filed an opinion dissenting from Part I. REHNQUIST, J., filed a dissenting opinion, see No. 73-5615.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-473

Daniel T. Taylor, III, Petitioner, *v.* John P. Hayes, Judge, Jefferson Circuit Court, Criminal Branch, Second Division.	On Writ of Certiorari to the Court of Appeals of Kentucky.

[June 26, 1974]

MR. JUSTICE WHITE delivered the opinion of the Court.

The question in this case concerns the validity of a criminal contempt judgment entered against petitioner by reason of certain events occurring in the course of a criminal trial in the courts of the Commonwealth of Kentucky. Petitioner was retained counsel for Narvel Tinsley, a Negro, who along with his brother Michael was charged with the murders of two police officers. According to the Kentucky Court of Appeals, the "murders created some considerable sensation in Louisville . . . and newspaper coverage was overly abundant." *Taylor* v. *Hayes*, 494 S. W. 2d 737, 739 (1973). Trial before respondent trial judge began on October 18, 1971, and was completed on October 29.

On nine different occasions during this turbulent trial, respondent, out of the hearing of the jury and most often in chambers, informed petitioner that he was in contempt of court. The first charge was immediately reduced to a warning and no sentence was imposed at the

time of charge in that or any other instance. Petitioner was permitted to respond to most, but not all, of the charges.[1]

At the conclusion of the trial on October 29 and after a guilty verdict had been returned, respondent, in the presence of the jury, made a statement concerning petitioner's trial conduct. Refusing petitioner's request to respond and declaring that "I have you" on nine counts, respondent proceeded to impose a jail term on each count totalling four and one-half years: 30 days on the first count, 60 days on the second, 90 days on the third, six months on counts four, five, six, and seven, and one year each on counts eight and nine, "all to run consecutive."[2] A few days later, petitioner

[1] When for the sixth time petitioner was informed that he was in contempt, he sought to reply and was informed he could do so at the next recess. Nothing more appears in the record with respect to this episode. On the seventh occasion, petitioner undertook to respond but respondent left the chambers, and any further discussion of this charge was apparently ordered excluded from the record by respondent. Petitioner was denied the right to respond when he was informed of the eighth charge of contempt. As far as the record shows, there was neither a request to respond nor denial of response in connection with the ninth contempt charge.

[2] The following is the complete transcript of the proceedings on October 29, 1971, with respect to the contempt charges against petitioner:

"The Court: Mr. Taylor, the Court has something to take up with you sir, at this time.

"Mr. Taylor: Well, I'll be right here, Judge.

"The Court: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.

"For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon

was also barred from practicing law by respondent in his division of the Criminal Branch of the Jefferson Circuit Court.

---

deceit; it doesn't mean that it's based upon trickery; it doesn't mean it's based upon planned confusion.

"Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

"It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

"As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule.—

"Mr. Taylor: (Interrupting) Thank you:

"The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself.

"Mr. Taylor: I would respond to you, sir—

"The Court: (Interrupting) You're not responding to me on anything.

"Mr. Taylor: (Interrupting) Oh yes, I will.

"The Court: Yes, you're not, either.

"Mr. Taylor: Yes, I will.

"The Court: The sentence is on Count One—

"Mr. Taylor: (Interrupting) Unless you intend to gag me—

"The Court: (Interposing) I'll do that—

"Mr. Taylor: (Interposing) My lawyers will respond to you—

"The Court: (Interposing) I'll do that, sir.

"Mr. Taylor: My lawyers will respond to you, sir.

"The Court: You be quiet, or you'll—there will be some more contempts—

"Mr. Taylor: (Interrupting) No, you heard what I said.

"The Court: I have you nine counts. First Count, 30 days in jail; Second Count, 60 days in jail; Third Count, 90 days in jail; Fourth Count, six months in jail; Fifth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

"Take him away.

While petitioner's appeal was pending, on March 2, 1972, respondent entered a corrected judgment containing a "certificate" which described the nine charges of contempt [3] but eliminated the first charge as having been

"Mr. Taylor: We will answer you in court.

"The Court: I'd be glad to see you."

App., at 28–29.

[3] The nine charges of contempt were described in the certificate as follows:

"*Contempt 1.* Mr. Taylor, in questioning a prospective juror, on the second day of Voir Dire, repeatedly ignored the Court's order not to continue a certain line of questioning and to ask his questions of the jury as a whole, He evidenced utter disrespect for prospective jurors (T. E. 335–347).

"*Contempt 2.* The court sustained the Commonwealth objection on the use of a prior statement to cross examine Officer Hogan and not to go into the escape of Narvel Tinsley. Mr. Taylor repeatedly and completely ignored the court's ruling (T. E. 1071–1080).

"*Contempt 3.* During the playing of a tape recording of the voice of witness David White, Mr. Taylor wrote on a blackboard. After the playing of the tape it was ordered that the blackboard be removed from the court and Mr. Taylor was advised by the court that he could use it in his final summation to the jury. Mr. Taylor was disrespectful to the court by his tone of voice and manner when he replied, 'I'll certainly keep that in mind, your Honor' (T. E. 135).

"*Contempt 4.* During cross-examination of Narvel Tinsley, by Mr. Schroering, Mr. Taylor interrupted and moved for a recess, was overruled by the court, and then became most disrespectful to the court and refused to take his seat at counsel's table as ordered.

"*Contempt 5.* Complete and utter disrespect by Mr. Taylor in the questioning of Mr. Irvin Foley, and (sic) attorney and Legal Advisor to the Louisville Police Department when he continually disobeyed the court's ruling regarding a press conference which the court had ruled on unadmissible (sic). Mr. Taylor accused the court of disallowing admittance of black persons in the courtroom during the examination of this witness and made a statement in the presence of the jury inferring that only white police officers could enter the courtroom. It has always been the rule of this court that there will be no interruption during the examination of a witness or during

reduced to a warning and reduced the sentence on each of the last two counts to six months in jail. The corrected judgment was silent as to whether the sentences were to run concurrently or consecutively.

The Kentucky Court of Appeals affirmed, holding that petitioner was guilty of each and every contempt charged. In its view, petitioner's actions "were deliberate, delaying or planned disruptive tactics which did in fact create such an atmosphere in the court that he, if permitted to continue, would have appeared to be the star performer in the center ring of a three-ring circus." 494 S. W. 2d, at 740. Petitioner had "committed innumerable acts . . .

---

closing arguments by people coming and going into and from the courtroom, which rule was known to Mr. Taylor, (T. E. 1950–1955).

"*Contempt 6.* The witness Jesse Taylor, a Louisville Police Officer, read a statement by witness, David White. A Ruling was made by the court that the statement spoke for itself, had been introduced in evidence and could not be commented on by Officer Taylor, who merely took the statement. Mr. Taylor continued to disregard the court's order and ruling by continually reading parts of the statement out of context (T. E. 2008–2016).

"*Contempt 7.* Mr. Taylor in examining Mr. Norbert Brown, again referred to a press conference that the court had previously ordered him not to go into. He also waved his arms at the witness in a derogatory manner indicating the witness was not truthful and showing utter contempt of the court's ruling (T. E. 2030–2032).

"*Contempt 8.* The court directed Mr. Taylor to call his next witness. He called Lt. Garrett, Louisville Police Department. After the witness was sworn and took the stand, a deputy Sheriff advised the court that Mr. Taylor's aide was not searched, as everyone else had been upon entering the courtroom. Mr. Taylor ordered the deputy to search his aide. The court ordered Mr. Taylor to begin his examination, which he refused to do until he was cited for contempt in the court's chamber (T. E. 2068–2069).

"*Contempt 9.* Mr. Taylor repeatedly asked the same question of witness Floyd Miller that the court had held improper. He was also disrespectful in his tone of voice when referring to a certain police officer as 'this nice police officer' (T. E. 2169–2172)."

App., at 24–26.

which clearly reflected his contempt for the court as well as the judicial system of this Commonwealth . . ." and had been "overbearing, contemptuous, and obnoxiously persistent in his questions and objections . . . ." *Id.*, at 741. The Court of Appeals also concluded that petitioner had not launched any "personal attack" on the trial judge and that the judge had neither conducted himself as an "activist seeking combat" nor had become so personally embroiled that he was disqualified to sit in judgment on the charges of contempt, although his remarks prior to entering judgment of contempt at the conclusion of the trial were "inappropriate." *Id.*, at 744–745.

The Court of Appeals further ruled that because the amended judgment did not "direct that the sentences, as amended, be served consecutively[,] . . . they must be served concurrently." *Id.*, at 746. Thus, "the penalty actually imposed on Daniel Taylor [was] six months in jail," and his conviction and sentence without a jury trial was deemed constitutionally permissible. *Id.*, at 747. The Kentucky Court of Appeals ruled, however, that it had exclusive authority to discipline or disbar attorneys and that, in any event, the rule in Kentucky since 1917 had been that suspension from practice was not a permissible punishment for criminal contempt. The order prohibiting petitioner from practicing in the Jefferson Circuit Court, Criminal Branch, Second Division, was therefore reversed. We granted certiorari limited to specified issues, 414 U. S. 1063 (1973).

I

Petitioner contends that any charge of contempt of court, without exception, must be tried to a jury. Quite to the contrary, however, our cases hold that petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty of-

fense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute. *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966); *Bloom* v. *Illinois*, 391 U. S. 194 (1968); *Dyke* v. *Taylor Implement Mfg. Co., Inc.*, 391 U. S. 216 (1968); *Frank* v. *United States*, 395 U. S. 147 (1969); *Baldwin* v. *New York*, 399 U. S. 66 (1970). Hence, although petitioner was ultimately found guilty and sentenced separately on eight counts of contempt, the sentences were to run concurrently and were, as the Kentucky Court of Appeals held, equivalent to a single sentence of six months. Cf. *Codispoti* v. *Pennsylvania*, *post*. The original sentences imposed on the separate counts were to run consecutively and totaled almost four and one-half years, with two individual counts each carrying a year's sentence. But the trial court itself entered an amended judgment which was understood by the Kentucky Court of Appeals to impose no more than a six-month sentence. The eight contempts, whether considered singly or collectively, thus constituted petty offenses, and trial by jury was not required.

It is argued that a State should not be permitted, after conviction, to reduce the sentence to less than six months and thereby obviate a jury trial. The thrust of our decisions, however, is to the contrary: in the absence of legislative authorization of serious penalties for contempt, a State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months. We discern no material difference between this choice and permitting the State, after conviction, to reduce a sentence to six months or less rather than to retry the contempt with a jury. Cf. *Cheff* v. *Schnackenberg*, *supra*, 384 U. S., at 380. In either case, the State itself has determined that the contempt is not so serious as to warrant more than a six-months sentence. We remain firmly committed to the proposition that "criminal con-

tempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved." *Bloom* v. *Illinois*, *supra*, 391 U. S., at 211; cf. *Argersinger* v. *Hamlin*, 407 U. S. 25, 30 (1972).

II

We are more persuaded by petitioner's contention that he was entitled to more of a hearing and notice than he received prior to final conviction and sentence. In each instance during the trial when respondent considered petitioner to be in contempt, petitioner was informed of that fact and, in most instances, had opportunity to respond to the charge at that time. It is quite true, as the Kentucky Court of Appeals held, that "[t]he contempt citations and the sentences coming at the end of the trial were not and could not have been a surprise to Taylor, because upon each occasion and immediately following the charged act of contempt the court informed Taylor that he was at that time in contempt of court." 494 S. W. 2d, at 741–742. But no sentence was imposed during the trial, and it does not appear to us that any final adjudication of contempt was entered until after the verdict was returned. It was then that the court proceeded to describe and characterize petitioner's various acts during trial as contemptuous, to find him guilty of nine acts of contempt and to sentence him immediately for each of those acts.

It is also plain from the record that when petitioner sought to respond to what the Kentucky Court of Appeals referred to as the trial court's "declaration of a charge against Taylor based on the judge's observations" during trial,[4] respondent informed him that "you are not responding to me on anything" and even indicated that petitioner might be gagged if he insisted on defending

[4] 494 S. W. 2d, at 744.

himself.[5] The trial court then proceeded without further formality to impose consecutive sentences totalling almost four and one-half years in the county jail and to bar petitioner forever from practicing before the court in which the case at issue had been tried.

This procedure does not square with the Due Process Clause of the Fourteenth Amendment. We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. *Ex parte Terry*, 128 U. S. 289 (1888). The usual justification of necessity, see *Offutt* v. *United States*, 348 U. S. 11, 14 (1954), is not nearly so cogent when final adjudication and sentence are postponed until after trial.[6] Our decisions establish that summary punishment need not always be imposed during trial if it is to be permitted at all. In proper circumstances, particularly where the offender is a lawyer representing a client on trial, it may be postponed until the conclusion of the proceedings. *Sacher* v. *United States*, 343 U. S. 1 (1952); cf. *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 463 (1971). But *Sacher* noted that "[s]ummary punishment always, and rigtly, is regarded with disfavor . . . ." 343 U. S., at 8. "[W]e have stated time and again that reasonable notice of a charge and opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'" *Groppi* v. *Leslie*, 404 U. S. 496, 502 (1972), quoting *In re Oliver*, 333 U. S. 257, 273 (1948). Even where summary

[5] App., at 29.

[6] "Punishment without issue or trial [is] so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court [is] required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it." *Cooke* v. *United States*, 267 U. S. 517, 536 (1925).

punishment for contempt is imposed during trial, "the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi* v. *Leslie, supra,* 404 U. S., at 504 (and cases cited therein).[7]

On the other hand, where conviction and punishment are delayed, "it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business." *Ibid.* As we noted in *Groppi,* the contemnors in the *Sacher* case were "given an opportunity to speak" and the "trial judge would, no doubt, have modified his action had their statements proved persuasive." *Id.,* at 506 and n. 11. *Groppi* counsels that before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full-scale trial is appropriate. Usually, the events have occurred before the judge's own eyes, and a reporter's transcript is available. But the contemnor might at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or, he might present matters in mitigation or otherwise attempt to make amends with the court. Cf. *Groppi* v. *Leslie, supra,* 404 U. S., at 503, 506 n. 11.[8]

---

[7] *Groppi* dealt with contempt of a state legislative body, and the contempt action was not taken until several days later without notice or opportunity for Groppi to be heard.

[8] The American Bar Association Advisory Committee on the Judge's Function has recommended, *inter alia:*

"Notice of charges and opportunity to be heard.

"Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a sum-

These procedures are essential in view of the heightened potential for abuse posed by the contempt power. *Bloom* v. *Illinois, supra,* 391 U. S., at 202; *Sacher* v. *United States, supra,* 343 U. S., at 12. The provision of fundamental due process protections for contemnors accords with our historic notions of elementary fairness. While we have no desire "to imprison the discretion of judges within rigid mechanical rules," *Offutt* v. *United States, supra,* 348 U. S., at 15, we remain unpersuaded that "the additional time and expense possibly involved . . . will seriously handicap the effective functioning of the courts." *Bloom* v. *Illinois, supra,* 391 U. S., at 208–209. Due process cannot be measured in minutes and hours or dollars and cents. For the accused contemnor facing a jail sentence, his "liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." *Morrissey* v. *Brewer,* 408 U. S. 471, 482 (1972).

---

mary opportunity to adduce evidence or argument relevant to guilt or punishment.

"*Commentary*

"Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte Terry,* 128 U. S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness, and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course. Nothing in this standard, however, implies that a plenary trial of contempt charges is required." ABA Standards Relating to The Function of the Trial Judge § 7.4, at 95 (Approved Draft 1972). Cf. Fed. Rule Crim. Proc. 42 (b); *Harris* v. *United States,* 382 U. S. 162 (1965).

State courts have reached a similar conclusion. See, *e. g.,* New York State Appellate Division, First and Second Departments, Special Rules Governing Court Decorum § 609.2 (b) (1971) in Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct 352 (1973).

Because these minimum requirements of due process of law were not extended to petitioner in this case, the contempt judgment must be aside.[9]

III

We are also convinced that if petitioner is to be tried again, he should not be tried by respondent. We agree with the Kentucky Court of Appeals that petitioner's conduct did not constitute the kind of personal attack on respondent that, regardless of his reaction or lack of it, he would be "[un]likely to maintain that calm detachment necessary for fair adjudication." *Mayberry* v. *Pennsylvania, supra,* 400 U. S., at 465.

But contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot "hold the balance nice, clear and true between the State and the accused . . . ." *Tumey* v. *Ohio,* 273 U. S. 510, 532 (1927). In making

[9] My Brother REHNQUIST's dissent insists that the Court has rejected the teaching of *Sacher* v. *United States, supra,* that in a post-trial contempt proceeding, the court need not afford the contemnor the full panoply of procedures such as "the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with *a conventional court trial.*" 343 U. S., at 9 (emphasis added). But all we have decided today is that a contemnor is entitled to the elementary due process protections of "reasonable notice of the specific charges and opportunity to be heard in his own behalf," *ante,* at 10, neither of which petitioner received. Nowhere do we intimate that "a full-scale trial is appropriate." *Ibid;* see also n. 8, *supra.* Moreover, whatever justifications may sometimes necessitate immediate imposition of summary punishment during trial "to maintain order in the courtroom and the integrity of the trial process in the face of an 'actual obstruction of justice,'" *Codispoti* v. *Pennsylvania, post,* at 6, "[r]easons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise." *Sacher* v. *United States, supra,* 343 U. S., at 9–10.

this ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar* v. *Sarafite*, 376 U. S. 575, 588 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. *In re Murchison*, 349 U. S. 133, 136 (1955).

With these considerations in mind, we have examined the record in this case, and it appears to us that respondent did become embroiled in a running controversy with petitioner. Moreover, as the trial progressed, there was a mounting display of an unfavorable personal attitude toward petitioner, his ability and his motives, sufficiently so that the contempt issue should have been finally adjudicated by another judge.

Early in the trial respondent cautioned petitioner against "putting on a show" and added that "if you give him an inch, he'll take a mile. I might as well sit on him now." App., at 31, 40. On another occasion when petitioner asserted that his purpose was to defend his case, respondent replied, "I am not sure." *Id.*, at 61. When petitioner remarked that he had five months wrapped up in the case, respondent retorted that "[b]efore it's over, you might have a lot more than that." *Id.*, at 98. On the other hand, petitioner complained of respondent's "overbearing contentiousness in regard to me, both by phrase and by its utterances," and asserted that the court was prejudicing the trial of his case. *Id.*, at 60. Respondent was likewise said to be "using the brute power of your office" in saying that petitioner was damaging his client. *Id.*, at 61. On another occasion, respondent un-

derstood petitioner to be asserting that he, respondent, had rigged the jury. *Id.*, at 85–86.

That respondent had reacted strongly to petitioner's conduct throughout the 10-day trial clearly emerged in the statement which he made prior to sentencing petitioner and which the Court of Appeals characterized as "inappropriate." There he said petitioner had put on "the worst display" he had seen in many years at the bar—"[a]s far as a lawyer is concerned, you're not." *Id.*, at 28. Furthermore, respondent denied petitioner the opportunity to make any statement at that time, threatened to gag him and forthwith sentenced him to four and one-half years in jail, not to mention later disbarring him from further practice in his court. He also refused to grant him bail pending appeal. We assume for the purposes of this case that each of the charged acts was contemptuous; nevertheless, a sentence of this magnitude reflects the extent to which the respondent became personally involved. Cf. *Offutt* v. *United States*, *supra*, 348 U. S., at 17.

From our own reading of the record, we have concluded that "marked personal feelings were present on both sides" and that the marks of "unseemly conduct [had] left personal stings," *Mayberry* v. *Pennsylvania*, *supra*, 400 U. S., at 464. A fellow judge should have been substituted for the purpose of finally disposing of the charges of contempt made by respondent against petitioner. Respondent relies on *Ungar* v. *Sarafite*, *supra*, but we were impressed there with the fact that the judge "did not purport to proceed summarily during or at the conclusion of the trial, but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding." 376 U. S., at 588.[10]

[10] The dissent also asserts that our decision provides the means whereby "a judge *can* be driven out of a case by any counsel suffi-

Nothing we have said here should be construed to condone the type of conduct described in the opinion of the Kentucky Court of Appeals and found by that court to have been engaged in by petitioner. Behavior of this nature has no place in the courtroom which, in a free society, is a forum for the courteous and reasoned pursuit of truth and justice.

The judgment of the Kentucky Court of Appeals is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS joins Parts II and III of the Court's opinion.

---

ciently astute to read the new-found constitutional principles enunciated [here and in *Mayberry* v. *Pennsylvania, supra*]." *Post*, at 8. But this statement—perhaps dissenters' license—misconceives our holding and undervalues the import of the Due Process Clause. As expressly noted in the text, we by no means equate this case with *Mayberry* v. *Pennsylvania*. It is not petitioner's conduct, considered alone, that requires recusal in this case; rather, the critical factor, as revealed by the record before us, is the character of respondent's response to misbehavior during the course of the trial. The dissent, of course, may view the record differently, but on that issue we are in unavoidable disagreement.

SUPREME COURT OF THE UNITED STATES

No. 73-473

Daniel T. Taylor, III,
Petitioner,
v.
John P. Hayes, Judge, Jefferson Circuit Court, Criminal Branch, Second Division.

On Writ of Certiorari to the Court of Appeals of Kentucky.

[June 26, 1974]

MR. JUSTICE MARSHALL, dissenting in part.

I join Parts II and III of the opinion of the Court, but I cannot join the holding in Part I that petitioner was not entitled to a jury trial. Petitioner was summarily convicted of contempt and sentenced to almost four and one-half years in prison. In my view, this sentence marked the contempt charges against petitioner as "serious" rather than "petty" and called into play petitioner's Sixth Amendment right to a jury trial.

The Court, however, relies on the fact that the trial judge subsequently realized his error and reduced the sentence to six months. The Court characterizes this as a determination by the state that "the contempt is not so serious as to warrant more than a six-months sentence." *Ante*, at 7. In my view, the trial judge's reduction of petitioner's sentence was a transparent effort to circumvent this Court's Sixth Amendment decisions and to save his summary conviction of petitioner without the necessity of airing the charges before an impartial jury. It is hardly coincidence that petitioner's sentence was reduced to the maximum that our decisions would permit.

Today's decision represents an extraordinarily rigid

and wooden application of the six-month rule that the Court has fashioned to determine when the Sixth Amendment right is applicable. In permitting this obvious device to succeed, I think that the Court changes the nature of the six-month rule from a reasonable effort to distinguish between "serious" and "petty" contempts into an arbitrary barrier behind which judges who wish to protect their summary contempt convictions without exposing their charges to the harsh light of a jury may safely hide. The very fact that such a substantial contempt sentence was imposed, and then reduced to the six-month maximum, should be a warning to us that the fairness of the process which petitioner has received is suspect, and that the contempt charges involved here especially require the scrutiny of a jury trial. Dicta in the plurality opinion in *Cheff* v. *Schnackenberg*, 384 U. S. 373, 380 (1966), to the contrary notwithstanding, I do not believe that petitioner could be deprived of his Sixth Amendment right to jury trial, once it attached through the imposition of a substantial sentence, by the subsequent action of the trial court or an appellate court in reducing the sentence.